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93-7407

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT O'NEAL,

Petitioner,

v.

TERRY L. MORRIS, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES KURA
Ohio Public Defender

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143 pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHEN THE STATE COURT DID NOT HAVE AN OPPORTUNITY TO REVIEW THE IMPACT OF AN ERROR, AND THE FEDERAL HABEAS COURT IS THE FIRST COURT TO REVIEW THE CONSTITUTIONAL ERROR, DOES THE COURT APPLY THE CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) OR BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993) HARMLESS ERROR STANDARD?

II.

DOES THE STATE HAVE THE BURDEN OF PROVING A CONSTITUTIONAL ERROR TO BE HARMLESS UNDER BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993)?

III.

DOES IT VIOLATE DUE PROCESS TO APPLY LOCKHART V. FRETWELL, 113 S.CT. 838 (1993) RETROACTIVELY TO A CASE PENDING ON REVIEW IN WHICH A WRIT WAS GRANTED UNDER THE THEN APPROPRIATE CONSTITUTIONAL STANDARD AND THE PETITIONER IN RELIANCE OF TEAGUE V. LANE, 489 U.S. 288 (1989) DID NOT CROSS APPEAL THE DENIAL OF OTHER CONSTITUTIONAL CLAIMS?

IV.

MUST A COURT COLLECTIVELY EVALUATE THE IMPACT OF DEFECTIVE JURY INSTRUCTIONS ON INTENT, PROSECUTORIAL MISCONDUCT, AND THE ADMISSION OF ERRONEOUSLY ADMITTED EVIDENCE IN DETERMINING WHETHER OR NOT A PETITIONER WAS DEPRIVED OF A FAIR TRIAL?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT O'NEAL,

Petitioner,

v.

TERRY L. MORRIS, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner, Robert O'Neal, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on August 20, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported and is reproduced in the Appendix to this petition at A-1. The entry of the Court of Appeals denying rehearing and rehearing **en banc** is reproduced at A-8.

The judgment of the United States District Court for the Southern District of Ohio, Western Division, is unreported but is reproduced at A-9. The opinion of the district court is

unreported but is reproduced at A-10. The Magistrate's Supplemental Report and Recommendation is unreported but is reproduced at A-14. The district court's original remand order is unreported, but reproduced at A-23. The Magistrate's Report and Recommendation is unreported, but reproduced at A-28.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 20, 1993. The order of the Court of Appeals denying petitioner's petition for rehearing and suggestion rehearing **en banc** was entered on October 4, 1993. This petition is timely filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case also involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

FOURTEENTH AMENDMENT

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

STATE COURT PROCEEDINGS

The incident underlying the indictment in this case involved the kidnapping, aggravated robbery and aggravated murder of Henry Podborny and the underlying conspiracy to commit those acts. Six people were indicted by the Cuyahoga County, Ohio Grand Jury for Aggravated Murder, Aggravated Robbery, and Kidnapping. The individuals were: (1) Lola Gail Toney, who conceived the whole plan and was convicted of all charges on July 17, 1981 (she testified for the State in this case); (2) Gary Gabbard -- Mrs. Toney's brother -- who was also convicted on July 17, 1981; (3) Lee Waress who pleaded guilty only to conspiracy to kidnap (he testified in this case pursuant to a defense subpoena); (4) Dimple Podborny (now deceased) who was Gail Toney's mother-in-law and was Henry Podborny's wife (she was convicted in this case); (5) Lloyd Allen was convicted in this case; and (6) Robert O'Neal, Petitioner, was convicted in this case. A seventh person, James McClean, who was involved in this scenario with Gail Toney from the beginning, escaped similar indictments by becoming an F.B.I. informant. McClean testified for the State in this case pursuant to an agreement with the F.B.I. and United States Attorney whereby he pleaded guilty to interstate transportation of stolen checks and no further state or federal charges would be placed against him (Tr. p. 3236).

The case started when Gail Toney conspired with others (not Petitioner) to extort money from Dimple Podborny, under the guise they were protecting Dimple from her husband. Later the goal of

the conspiracy changed to kidnapping Henry Podborny and holding him while his property was looted. Later the goal was to have Mr. Podborny declared incompetent so that his wife could assume legal control over his property. Unfortunately, Mr. Podborny was killed. The jury was presented with conflicting evidence of who killed Mr. Podborny. That mystery remains.

The State's circumstantial case against Petitioner relied heavily on Gail Toney's testimony. Gail Toney had already been convicted and was testifying pursuant to a plea agreement with the State (Tr. p. 1631). The other conspirators were told about Petitioner by Gail Toney, O'Neal was not part of their discussions (Tr. pp. 2062, 2065, 2071, 3069, 3222-23, 3232, 5173-5239). James McLean testified that he had seen Toney with a .38 revolver (Tr. p. 3219). Henry Podborny arrived in Cleveland on January 29, 1981, and disappeared. McLean also testified that on January 29, 1981 at 11:30 p.m., Gail Toney called McLean and told him that she and Gary Gabbard had grabbed Henry Podborny, tied him up, and taken his property. No mention was made of Petitioner (Tr. pp. 3227-3230). Toney made up Petitioner's involvement to justify keeping a larger part of the stolen money from the others. Petitioner denied any involvement (Tr. p. 4868). Allen also denied any involvement (Tr. p. 4961). The State also relied on Wilbur Higgins' testimony, despite the fact that a federal evidentiary hearing has demonstrated that Higgins lied (Doc. 60). The trial court record also supported a finding that Petitioner is factually innocent of the charges. The jury had to weigh the evidence and make factual findings. The

physical evidence was consistent with the possibility that Gail Toney killed Henry Podborny, and that Petitioner was not involved in the conspiracy.

Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and the Ohio Supreme Court.

FEDERAL HABEAS CORPUS PROCEEDINGS

In 1986, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The case was assigned to a Magistrate Judge. The Magistrate Judge held two hearings on this case, an oral argument, and an evidentiary hearing.

On January 22, 1992, the Magistrate Judge issued his Report and Recommendation and recommended that some claims warranted a new trial. The Magistrate Judge found that Petitioner's constitutional rights were not violated when Petitioner was tried jointly, and denied the right to cross examine a F.B.I. agent. The Magistrate Judge also ruled that Petitioner's challenge to the racial composition of the jury had factual support, but lacked merit since **Batson v. Kentucky**, 476 U.S. 79 (1986) was not to be applied retroactively. The Magistrate Judge found the jury instructions on intent were constitutionally defective, and that prosecutorial misconduct and erroneously admitted evidence deprived Petitioner of a fundamental fair trial. A new trial was recommended.

The District Court remanded the case to the Magistrate Judge for further review on the jury instruction issue. The Magistrate Judge completed the review and issued a Supplemental Report and Recommendation reaffirming that a new trial was mandated. The District Court adopted both reports and ordered a new trial.

The State appealed to the Sixth Circuit Court of Appeals and obtained a stay. During the pending of the State's appeal, this Court issued decisions in **Brecht v. Abrahamson**, 113 S.Ct. 1710 (1993), and **Lockhart v. Fretwell**, 113 S.Ct. 838 (1993).

The Sixth Circuit Court of Appeals found that the constitutional and nonconstitutional error findings made by the lower courts were correct, however, the court found that these errors were harmless under **Brecht** and Petitioner was not deprived of a fair trial. **O'Neal v. Morris**, 3 F.3d 143 (6th Cir. 1993). Petitioner filed a timely Petition for Rehearing with Suggestion for **En Banc** Rehearing. Petitioner based that motion on the basis that the court's decision was erroneous and conflicted with other Sixth Circuit decisions and opinions from other Federal Circuits.

A timely petition is made to this Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT NEEDS TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE FOURTH, SIXTH, EIGHTH, AND ELEVENTH CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHAT HARMLESS ERROR STANDARD OF REVIEW IS TO BE APPLIED WHEN THE STATE COURT DID NOT REVIEW THE IMPACT OF THE ERROR AND THE FEDERAL COURT IS FIRST TO REVIEW THE CONSTITUTIONAL ERROR.

There is currently a conflict between the Federal Circuit Court of Appeals on whether or not the **Brecht v. Abrahamson**, 113 S.Ct. 1710 (1993) or **Chapman v. California**, 386 U.S. 18 (1967) harmless error standard is to be applied in federal habeas review when the Petitioner did not receive the benefit of the lower **Chapman** standard in state court proceedings.

Without directly addressing the issues, several Federal Circuit Courts of Appeals who have applied the **Brecht** standard when the state court failed to recognize constitutional error and evaluate the error impact on the record. Petitioner's court has applied this higher standard despite the fact that Petitioner's case was never reviewed under the **Chapman** standard in state court proceedings. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993); **Cumbie v. Singletary**, 991 F.2d 715, 724 (11th Cir. 1993). These cases have applied the **Brecht** standard despite the fact that those petitioners never received the lower standard of review in state court proceedings.

The Eighth Circuit Court of Appeals has found that the **Brecht** rule does not apply under these circumstances:

> We believe the **Brecht** rule is based largely on the notion that because the state courts can properly apply the **Chapman** harmless error standard on direct review, the federal habeas courts need only review those decisions under the **Kotteakos** harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the **Chapman** harmless error standard. As a result, we find that rule announced in **Brecht** does not apply and that the **Chapman** harmless error standard is the appropriate test in this case.

Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). The Fourth Circuit Court of Appeals has not addressed the issue directly, but does recognize the inherent conflict with the **Brecht** standard:

> The **Brecht** court held that constitutional errors of the "trial" type are subject to a lower standard of harmless-error analysis on

> federal habeas review (error must not cause "actual prejudice," **see Kotteakos v. United States**, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)) than on direct appeal (error must be harmless beyond a reasonable doubt, **see Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 838, 17 L.Ed.2d 705 (1967)). **Brecht**, ___ U.S. at ___, 113 S.Ct. at 1721-22. Thus, **Brecht** created the following anomaly: If a state court conducts harmless-error review of a constitutional error, the defendant has the advantage of the State having to prove harmlessness beyond a reasonable doubt. If, however, the state court does not discover the error (as here), or does not review it for harmlessness (as here), the defendant is handicapped, since, on federal habeas review, the State has only to establish that the error did not "substantially prejudice" the jury's decision. **See id.** at ___, 113 S.Ct. at 1725 (White, J., dissenting)(explaining the "illogically disparate treatment" caused by **Brecht**).

Smith v. Dixon, 996 F.3d 667, 676 n. 13 (4th Cir. 1993). The **Dixon** court did not apply the **Brecht** or **Chapman** Standard, the court remanded the case to the state court for the **Chapman** analysis.

In view of the conflict between the Federal Circuit Courts of Appeals, this Court should grant certiorari and decide this important constitutional issue.

II.

THIS COURT NEEDS TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, SEVENTH, NINTH, AND ELEVENTH CIRCUIT COURT OF APPEALS ON WHO HAS THE BURDEN OF PROVING A CONSTITUTIONAL ERROR TO BE HARMLESS UNDER BRECHT V. ABRAHAMSON, 113 S.CT. 1710 (1993).

There is currently a conflict between the Federal Circuit Courts of Appeals on who has the burden of proving that a constitutional error was harmless under **Brecht v. Abrahamson**, 113

S.Ct. 1710 (1993). In Petitioner's case, the burden was placed on the defendant to prove that the constitutional error was not harmless, while other Federal Court of Appeals have placed the burden on the state. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993).

Several Federal Circuit Court of Appeals that have placed the burden of proving the error not to be harmless on the petitioner. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993); **Kyles v. Whitley**, 5 F.3d 806, 818 (5th Cir. 1993); **Tague v. Richards**, 3 F.3d 1133, 1140 (7th Cir. 1993); and **Henry v. Estelle**, 993 F.2d 1423, 1427 (9th Cir. 1993); **Cumbie v. Singletary**, 991 F.2d 715, 724 (11th Cir. 1993).

Other panels within some of the same Federal Circuit Courts of Appeals have placed the burden on the state to prove the constitutional error harmless under the **Brecht** standard. **Lowery v. Collins**, 996 F.2d 770, 773 (5th Cir. 1993); **Stoner v. Sowders**, 997 F.2d 209, 213 (6th Cir. 1993); **Sherman v. Smith**, 8 F.3d 820 (4th Cir. 1993) (unpublished 1992 WL 433317). **Lowery** and **Stoner** both rely on Justice Stevens' concurring opinion for placing the burden upon the state for proving harmless error. **Brecht v. Abrahamson**, 113 S.Ct. at 1723-24 (Stevens, J., concurring).

There is a split of opinions on the placement of the burden of proof under **Brecht** in determining harmlessness. In view of this conflict between the Federal Circuit Courts of Appeals, this Court should grant certiorari and decide this important constitutional issue.

III.

IT DOES VIOLATE DUE PROCESS TO APPLY LOCKHART V. FRETWELL, 113, S.CT. 838 (1993) RETROACTIVELY TO A CASE PENDING ON REVIEW IN WHICH A WRIT WAS GRANTED UNDER THE THEN APPROPRIATE CONSTITUTIONAL STANDARD AND THE PETITIONER IN RELIANCE OF TEAGUE V. LANE, 489 U.S. 288 (1989) DID NOT CROSS APPEAL THE DENIAL OF OTHER CONSTITUTIONAL CLAIMS.

The appellate court in Petitioner's case found that the district court applied the wrong standard of review when determining the jury instruction error. **O'Neal v. Morris**, 3 F.3d 143, 145 (6th Cir. 1993). In fact, the district court did apply the appropriate standard, since it was obligated to apply the law as it existed when Petitioner's conviction became final. See **Teague v. Lane**, 489 U.S. 288 (1989). That standard was changed in **Lockhart v. Fretwell** 113 S.Ct. 838, 844 (1993). **Fretwell** was decided while O'Neal's case was pending in the Sixth Circuit Court of Appeals; therefore, the district court did use the then proper standard. The appellate court is obligated to review cases and not to resolve disputed facts. The appellate court should have either remanded the case under **Fretwell** or reviewed the district court decision under the then appropriate standard of **Francis v. Franklin**, 471 U.S. 307, 315-16 (1985). To apply **Fretwell** retroactively to Petitioner's case, while on appeal, violates "petitioner's reliance on past judicial precedent" since Petitioner relied on the district court findings and did not file a cross appeal in this case on other constitutional claims that were denied. See **Fretwell**, 113 S.Ct. at 844. To apply **Fretwell** retroactively to Petitioner in this manner violates Petitioner's due process right.

This Court should grant certiorari and address the important constitutional issue.

IV.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY THE COLLECTIVE IMPACT OF DEFECTIVE JURY INSTRUCTIONS ON INTENT, PROSECUTORIAL MISCONDUCT, AND THE ADMISSION OF PREJUDICIAL ERRONEOUSLY ADMITTED EVIDENCE.

Magistrate Judge Steinberg found the combined effects of the errors created a "structural" error:

> The obvious purpose and the likely result of such inflammatory evidence and improper arguments was to cause the jury to abandon its impartiality in weighing the evidence. Added to that are the confusing jury instructions and the improper prosecution argument concerning them, which could have led a reasonable juror to conclude that O'Neal could be convicted of each crime absent specific intent. Furthermore, although the Supreme Court has foreclosed this issue as an independent ground for constitutional error, it is important to note that O'Neal was intentionally deprived of the presence of any juror of his race to deliberate his fate.
>
> Following the mechanical approach to [**Arizona v.**] **Fulminate** [, 111 S.Ct. 1246 (1991)] of dividing fair trial issues into two exclusive categories, we believe the circumstances outlined above created a "structural defect" in the trial. To paraphrase the Court in **Fulminante**, in the absence of an impartial jury, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" 111 S.Ct. at 1265, quoting **Rose v. Clark**, 478 U.S. 570, 577-78 (1986).

O'Neal v. Morris, Magistrate Report and Recommendation p. 43 (doc. 68) A-71.

The Sixth Circuit Court of Appeals failed to review the constitutional violations collectively. **O'Neal v. Morris**, 3 F.3d

143, 147-148 (6th Cir. 1993). A collective review would have demonstrated that a "structural defect" occurred at Petitioner's trial and he is entitled to a new trial. See **Sullivan v. Louisiana** 113 S.Ct. 2078, 2083-84 (1993).

The **Brecht-Kotteakos** harmless error rule applies to many constitutional trial errors identified in federal habeas corpus proceedings, but not all. It does not, for one, apply to errors involving prosecutorial misconduct. The Court said in **Brecht** that the **Brecht-Kotteakos** rule does not apply to "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct." **Brecht**, 113 S.Ct. at 1722 n.9. Under these circumstances, a rule of automatic reversal must be used or a review for collective impact must be made of the record. This exception exists in order to ensure that state prosecutors will not be tempted to deliberately violate a defendant's constitutional rights in the belief that any such violation will be held harmless.

The Sixth Circuit Court of Appeals' decision affirmed the district court finding that prosecutorial misconduct occurred at Petitioner's state trial. **O'Neal v. Morris**, 3 F.3d at 148. The Sixth Circuit Court of Appeals failed to consider the state courts' behavior as required by **Brecht-Kotteakos**. The district court, however, had evaluated the impact of the prosecutorial misconduct:

> In any event, assuming **arguendo**, that the jury instructions were not constitutionally defective, we would still recommend a finding that O'Neal was deprived of a fair trial based on the prosecutor's misconduct and the erroneously admitted evidence. We view the prosecutor's misconduct and the admission of inflammatory evidence as far more egregious errors than the confusing jury instructions. As we stated in the previous report and recommendation, "[w]e seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions." (doc. 68, p. 42).
>
> The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. See **id.** at 30-39. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the express purpose of inflaming the jury's passions. See **id.** 28-30, 39-40. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. **Id.** at 47-48. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence, taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

O'Neal v. Morris, Supplemental Magistrate Report and Recommendation pp. 7-8. (doc. 74) A-21-22.[1]

---

[1] In **McKinney v. Rees**, 993 F.2d 1378 (9th Cir. 1993) the Ninth Circuit Court of Appeals found a violation of due process under **Brecht** on only the admission of irrelevant evidence and improper use of character evidence. In O'Neal's case that error was combined with defective jury instructions and prosecutorial misconduct.

In his concurring opinion in **Greer v. Miller**, 483 U.S. 756 (1987), upon which the Court relied in **Brecht**, **see** 113 S.Ct. at 1722 n. 9, Justice Stevens identified another situation in which harmless error analysis does not apply. In addition to instances involving prosecutorial misconduct or a pattern of such conduct, there may be an instance in which the error complained of "is **combined with other errors** . . . [such] that the integrity of the proceeding is called into question." **Greer**, 483 U.S. at 769 (Stevens, J., concurring in judgment) (emphasis added). Such cumulative error is not only a well-recognized basis for habeas corpus relief, **see, e.g., Derden v. McNeel**, 978 F.2d 1453, 1456-59 (5th Cir. 1992) (en banc); **Lundy v. Campbell**, 888 F.2d 467, 481 (6th Cir. 1989), **cert. denied**, 495 U.S. 950 (1990); **Bell v. Duckworth**, 861 F.2d 169, 170 (7th Cir. 1988), **cert. denied**, 489 U.S. 1088 (1989), it is also resistant to harmless error analysis.

When a trial is tainted by a number of discrete trial errors it may be practically impossible -- as it is with so-called "structural errors" -- to evaluate the combined impact with any degree of confidence, even if the impact of any single error could be. At some point the number of errors is so great and their effects so interrelated that any attempt to separate them would be sheer guesswork and would "defy analysis by 'harmless-error' standards." **See Pulminante**, 111 S.Ct. at 1265. Magistrate Judge Steinberg applied **Lundy** to O'Neal's facts and found that the cumulative errors warranted a new trial. Magistrate's Report and Recommendation pp. 41,49 (doc. 68). The

Sixth Circuit Court of Appeals failed to review O'Neal's case under the cumulative error standard.

This Court should grant certiorari and determine the merits of this constitutional claim.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was forwarded by regular U.S. Mail to Suzanne Mohr, Assistant Attorney General and Lee I. Fisher, Ohio Attorney General at their offices at 30 East Broad Street, Columbus, Ohio 43266-0410, on this 3rd day of January, 1994. I further certify that all parties required to be served have been served.

THOMAS R. WETTERER, JR.
Assistant State Public Defender
Counsel of Record

COUNSEL FOR PETITIONER

und that pharmacists generally
to warn customers when their
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f a advertising campaign or of
duty which Eckerd might have
allegations were made for the
th plaintiffs' second amended
hic the district court did not
filed. As a result, those allega
e before the district court,
ic court was not required to
n in ruling on Eckerd's motion
judgment.

III

re ng reasons, we AFFIRM.

KEY NUMBER SYSTEM

nt unnecessary, those negotiations
la Podlesnick's hesitancy in seek-
m 1.). Wimm and Speer's expla-
ir ay in asserting these claims is

l urt found that Wimm and
st amendment would have been
"the amount of cough syrup given
a[d] been thoroughly investigated
rm ation made that [he] did not
ic se of the cough syrup." Be-
irm the district court's denial of
peer's motion on other grounds, we
id whether the proposed amend-
av een futile. We note, however,
ct urt's underlying assumption—
liscovery would not have revealed
m a toxic dose of cough syrup—
te y the record.

Robert O'NEAL, Petitioner-Appellee,

v.

Terry L. MORRIS, Respondent-Appellant.

No. 92-3763.

United States Court of Appeals, Sixth Circuit.

Argued May 6, 1993.

Decided Aug. 20, 1993.

Rehearing and Suggestion for Rehearing En Banc Denied Oct. 4, 1993.

State prisoner convicted of aggravated murder, aggravated robbery, and kidnapping petitioned for writ of habeas corpus. The United States District Court for the Southern District of Ohio, Herman J. Weber, J., granted the writ, and state appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that: (1) state's failure to file timely objections to magistrate's first report did not preclude its appeal, and (2) any error in jury instructions and prosecutor's closing argument pertaining to intent of conspirators or aiders and abettors was harmless, where all evidence upon which jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.

Reversed.

1. United States Magistrates ⇐25

Rule that party's failure to file timely objections to magistrate's report waives party's right to appeal is procedural, not jurisdictional, and Court of Appeals may excuse default in interests of justice. 28 U.S.C.A. § 636(b)(1).

2. United States Magistrates ⇐25

Rule that failure to file timely objections to magistrate's report waives right to appeal would not be applied to preclude state's appeal in habeas corpus case in which state's objections to magistrate's first report were filed approximately 20 days late, where court recommitted case to magistrate who issued second report, and state filed timely objections to second report, which district court considered. 28 U.S.C.A. § 636(b)(1).

3. Homicide ⇐305

Jury instructions in aggravated murder prosecution did not deprive defendant of a fair trial on ground they improperly suggested he could be convicted of offense as an aider and abettor or conspirator even if only his codefendants, and not defendant himself, possessed requisite intent to kill; court's reference to "defendants or codefendants or aiders and abettors" reminded jury that they could find that defendant had the intent to kill as a defendant or codefendant or as an aider and abettor; moreover, court stressed at least twice that jurors should separately consider elements applicable to each defendant as if he or she were separately tried.

4. Habeas Corpus ⇐497

Even if prosecutor's improper suggestion that prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach, in conjunction with confusion engendered by court's instructions on mens rea, abridged defendant's constitutional rights in aggravated murder prosecution, defendant was not prejudiced; although defendant argued that instructions permitted jury to find him guilty as an accomplice or conspirator by imputing to him intent of principals, all evidence which jury could have relied to establish defendant's guilt pointed to his guilt as a principal.

Thomas R. Wetterer, Jr. (argued & briefed), Public Defender's Office, Columbus, OH, for petitioner-appellee.

Suzanne E. Mohr (argued & briefed), Office of the Atty. Gen. of Ohio, Columbus, OH, for respondent-appellant.

Before: MILBURN, RYAN, and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

The state of Ohio, on behalf of warden Terry L. Morris of the Chillicothe Correctional Institute, appeals the district court's order which conditionally granted a writ of habeas corpus on the basis that improper jury instructions and other trial errors ren-

dered petitioner Robert O'Neal's state murder trial fundamentally unfair. We reverse.

I.

In 1981 petitioner was convicted by an Ohio jury of aggravated murder, aggravated robbery, and kidnapping in connection with the death of Henry Podborny. In January 1981 Podborny's estranged wife, Dimple, lured him from his home near Chicago on the pretense that she wished to resolve their marital difficulties. Three months later, authorities discovered Mr. Podborny's corpse in a field in Cleveland.

The evidence at trial revealed a detailed conspiracy among at least six individuals, including Dimple Podborny, her daughter-in-law, and acquaintances, to kidnap, rob, and murder Henry Podborny. The conspirators considered a number of plots, but eventually decided to have Dimple induce her husband to fly to Cleveland. Petitioner would then kidnap and hold him in the basement of an unlicensed saloon petitioner operated, while others would rob Mr. Podborny's residence and business.

On January 29, 1981, Mr. Podborny flew to the Cleveland airport, where Dimple's daughter-in-law, Lola Toney, met him and escorted him to petitioner's saloon. Minutes after Mr. Podborny entered, petitioner exited the bar and handed to Toney Podborny's wallet and other possessions. Soon after, another conspirator, Lloyd Allen, emerged from the bar and informed petitioner and Toney that he had struck Podborny with a pipe.

From January through March, Dimple, Toney, and others engaged in a variety of schemes to make it appear that Mr. Podborny was traveling on business, while they attempted to obtain his money. By late March, Toney believed Henry Podborny was no longer alive. His corpse was discovered a month later. Coroners determined that he had been struck at least five times in the head and shot once in the forehead. Petitioner, Dimple Podborny, Lola Toney, Lloyd Allen, and two others were subsequently indicted for aggravated murder, aggravated robbery, and kidnapping. After the case against three of the conspirators was resolved by a trial and a guilty plea, petitioner, Lloyd Allen, and Dimple Podborny were tried jointly and convicted on all counts. Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and Ohio Supreme Court.

In 1986, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court ruled that petitioner's trial had been fundamentally unfair and conditionally granted the writ. The state filed this timely appeal.

II.

Petitioner first argues that this court should not hear the state's appeal because the state's objections to the magistrate's first report, which recommended that the writ issue, were filed approximately twenty days late. *See* 28 U.S.C. § 636(b)(1) (setting ten-day deadline for objections to magistrate's report). This court held in *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), that a party's failure to file timely objections to a magistrate's report waives that party's right to appeal from the district court's decision to adopt the magistrate's report. *Id.* at 949–50. *See also Thomas v. Arn*, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985) (approving *Walters* rule).

While the district court agreed to strike the state's untimely objections, it declined to adopt the magistrate's entire report. Instead, the court recommitted the case to the magistrate for further consideration. After reconsideration, the magistrate issued a second report, again recommending that the court grant the writ and incorporating much of the reasoning articulated in the first report. The state filed timely objections to the second report, which the district court considered.

[1, 2] It is well established that the *Walters* rule is procedural, not jurisdictional, and that this court may excuse the default in the interests of justice. *Thomas*, 474 U.S. at 155, 106 S.Ct. at 475; *Kent v. Johnson*, 821 F.2d 1220, 1222–23 (6th Cir.), *amended on other grounds* (6th Cir.1987). This court has also concluded that when, as here, a district court considers untimely objections, the justi-

[illegible] a trial and a guilty plea, petitioner, [illegible] Allen, and Dimple Podborny were [illegible]y and convicted on all counts. Pe[illegible] successfully appealed his convic[illegible]e Ohio Court of Appeals and Ohio [illegible]me Court.

[illegible] petitioner filed a petition for a [illegible]abeas corpus pursuant to 28 U.S.C. [illegible]. The district court ruled that peti[illegible]'s [illegible]al had been fundamentally unfair [illegible]tionally granted the writ. The [illegible]filed this timely appeal.

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fications for enforcing the *Walters* rule dissipate. *Patterson v. Mintzes*, 717 F.2d 284, 286 (6th Cir.1983). Therefore, given the unique facts of this case, we conclude it is in the interests of justice to hear the state's appeal of the district court's decision that the writ be granted.

III.

In *Brecht v. Abrahamson*, — U.S. —, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court recently clarified the standard we must apply on habeas review of state court convictions. If we conclude that a federal constitutional trial error[1] occurred at petitioner's trial, we must ascertain whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict' " such that it resulted in actual prejudice. *Brecht*, — U.S. at —, —, 113 S.Ct. at 1717, 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). The habeas petitioner bears the burden of establishing such prejudice. *Id.*, — U.S. at —, 113 S.Ct. at 1722.

In petitioner's case, the district court adopted the magistrate's conclusion that the jury instructions given at petitioner's trial "were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to [petitioner]," thereby relieving the state of its burden to prove petitioner's intent to kill beyond a reasonable doubt, in violation of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Initially, we point out that the district court employed an outdated standard for evaluating petitioner's *Sandstrom* claim. The court incorrectly relied upon the test espoused in *Francis v. Franklin*, 471 U.S. 307, 315–16, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985), and *Sandstrom*, 442 U.S. at 514, 99 S.Ct. at 2454, and followed by this court in *Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir. 1982), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984), that jury instructions infringe a defendant's due process rights if a reasonable jury *could have* interpreted the instruction as unconstitutionally shifting the burden of proof. However, after reviewing its sometimes inconsistent articulations of the test, the Supreme Court settled on a single standard of review for jury instructions: " 'whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, — U.S. —, — & n. 4, 112 S.Ct. 475, 482 & n. 4, 116 L.Ed.2d 385 (1991) (emphasis added) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197, 108 L.Ed.2d 316 (1990)).

[3] With this standard, we turn to the instructions at issue here. Petitioner was charged with aggravated murder, aggravated robbery, and kidnapping. Under Ohio law, a court may instruct the jury on complicity even though the defendant was charged as a principal. *See* Ohio Rev.Code Ann. § 2923.03(A), (F) (Anderson 1993); *Hill v. Perini*, 788 F.2d 406, 407–08 (6th Cir.) (discussing the practice and holding that it does not violate a defendant's right to notice of the charges against him or her), *cert. denied*, 479 U.S. 934, 107 S.Ct. 409, 93 L.Ed.2d 361 (1986). Thus, in petitioner's case, the district court charged the jury that it could find petitioner guilty as a principal, as a coconspirator, or as an aider and abettor.

Charging a defendant as a conspirator or aider and abettor does not, however, alter the government's responsibility to establish intent to kill. Ohio law on complicity pro-

1. A constitutional trial error is one which "occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Id.*, — U.S. at —, 113 S.Ct. at 1717 (alterations in original) (citing *Arizona v. Fulminante*, — U.S. —, —, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991)). Such errors contrast with "structural defects in the constitution of the trial mechanism," such as deprivation of the right to counsel, which require automatic reversal because "they infect the entire trial process." *Id.* The Supreme Court recently noted that jury instruction errors quite similar to that alleged here, involving presumptions about an element of the offense, are amenable to harmless-error review. *See Sullivan v. Louisiana*, — U.S. —, —, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993).

dered petitioner Robert O'Neal's state murder trial fundamentally unfair. We reverse.

I.

In 1981 petitioner was convicted by an Ohio jury of aggravated murder, aggravated robbery, and kidnapping in connection with the death of Henry Podborny. In January 1981 Podborny's estranged wife, Dimple, lured him from his home near Chicago on the pretense that she wished to resolve their marital difficulties. Three months later, authorities discovered Mr. Podborny's corpse in a field in Cleveland.

The evidence at trial revealed a detailed conspiracy among at least six individuals, including Dimple Podborny, her daughter-in-law, and acquaintances, to kidnap, rob, and murder Henry Podborny. The conspirators considered a number of plots, but eventually decided to have Dimple induce her husband to fly to Cleveland. Petitioner would then kidnap and hold him in the basement of an unlicensed saloon petitioner operated, while others would rob Mr. Podborny's residence and business.

On January 29, 1981, Mr. Podborny flew to the Cleveland airport, where Dimple's daughter-in-law, Lola Toney, met him and escorted him to petitioner's saloon. Minutes after Mr. Podborny entered, petitioner exited the bar and handed to Toney Podborny's wallet and other possessions. Soon after, another conspirator, Lloyd Allen, emerged from the bar and informed petitioner and Toney that he had struck Podborny with a pipe.

From January through March, Dimple, Toney, and others engaged in a variety of schemes to make it appear that Mr. Podborny was traveling on business, while they attempted to obtain his money. By late March, Toney believed Henry Podborny was no longer alive. His corpse was discovered a month later. Coroners determined that he had been struck at least five times in the head and shot once in the forehead. Petitioner, Dimple Podborny, Lola Toney, Lloyd Allen, and two others were subsequently indicted for aggravated murder, aggravated robbery, and kidnapping. After the case against three of the conspirators was resolved by a trial and a guilty plea, petitioner, Lloyd Allen, and Dimple Podborny were tried jointly and convicted on all counts. Petitioner unsuccessfully appealed his conviction to the Ohio Court of Appeals and Ohio Supreme Court.

In 1986, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court ruled that petitioner's trial had been fundamentally unfair and conditionally granted the writ. The state filed this timely appeal.

II.

Petitioner first argues that this court should not hear the state's appeal because the state's objections to the magistrate's first report, which recommended that the writ issue, were filed approximately twenty days late. *See* 28 U.S.C. § 636(b)(1) (setting ten-day deadline for objections to magistrate's report). This court held in *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), that a party's failure to file timely objections to a magistrate's report waives that party's right to appeal from the district court's decision to adopt the magistrate's report. *Id.* at 949–50. *See also Thomas v. Arn*, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985) (approving *Walters* rule).

While the district court agreed to strike the state's untimely objections, it declined to adopt the magistrate's entire report. Instead, the court recommitted the case to the magistrate for further consideration. After reconsideration, the magistrate issued a second report, again recommending that the court grant the writ and incorporating much of the reasoning articulated in the first report. The state filed timely objections to the second report, which the district court considered.

[1, 2] It is well established that the *Walters* rule is procedural, not jurisdictional, and that this court may excuse the default in the interests of justice. *Thomas*, 474 U.S. at 155, 106 S.Ct. at 475; *Kent v. Johnson*, 821 F.2d 1220, 1222–23 (6th Cir.), *amended on other grounds* (6th Cir.1987). This court has also concluded that when, as here, a district court considers untimely objections, the justi-

vides that for a defendant to be convicted as an aider or abettor or conspirator, he or she must possess "the kind of culpability required for commission of [the principal] offense," here, a purpose to kill. Ohio Rev. Code Ann. §§ 2923.03(A)(2)-(3), 2903.01(A). In other words, Ohio does not adhere to the strict felony-murder rule. *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062, 1070 (1976), *rev'd on other grounds sub nom. Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Nevertheless, Ohio courts permit a jury to infer an aider and abettor's intent to kill when

> the facts show that the participants in a felony entered into a common design and *either* the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony *or* the felony and the manner of its accomplishment would be reasonably likely to produce death.

State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375, 382 (1980) (citing *Lockett*, 358 N.E.2d at syllabus ¶¶ 3–4).

Petitioner contends that in attempting to explain these principles of Ohio law, the trial court's instructions unreasonably confused the jury. The court charged that

> [p]urpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendants *or co-defendants or aiders and abettors*, if you so find, a specific intention to kill the decedent Henry Podborny.

(Emphasis added.) Similar instructions were read concerning the intent elements of aggravated robbery and kidnapping. The district court ruled that these instructions deprived petitioner of a fair trial because they improperly suggested that he could be convicted of these offenses as an aider and abettor or conspirator even if only his codefendants, and not petitioner himself, possessed the requisite intent to kill.

However, when read against the backdrop of Ohio complicity law, the court's reference to "defendants or co-defendants or aiders and abettors" appears to be nothing more than an unartful boilerplate reiteration that the same individuals could be found guilty *either* as principals ("defendants or co-defendants") or as "aiders and abettors." *See Hill*, 788 F.2d at 407–08. The phrase did not instruct the jury that it could convict petitioner by finding intent to kill in his codefendants or aiders and abettors; rather, it reminded the jury that they could find that petitioner had intent to kill as a defendant *or* a codefendant *or* an aider and abettor. This reading is supported by the fact that the challenged phrase follows close on the heels of the court's unequivocal statement that "[p]urpose to kill is an element of the crime of aggravated murder." Furthermore, in its instructions, the court stressed at least twice that the jurors "must separately consider the elements applicable to each of the defendants as [if] he or she were separately tried" and not allow their conclusions about one defendant to influence the verdict as to the other defendants.

Moreover, elsewhere in his charge, the trial judge stated:

> The Court in order to assist you understand [sic] the element of purpose and purposely herein, wherein the evidence discloses an existence of complicity by way of aider and abettor and conspiracy, the Court instructs you, as I stated in the law of Ohio as follows: When you have an unlawful act being contemplated in an original conspiracy such as a kidnapping, stealing and so forth, although not identical with or similar to criminal acts charged, if the defendants conspired to commit the unlawful act in the manner in which it was performed *would reasonably and likely produce* the death of another, then each conspirator is equally guilty as the principal offender of the homicide although such conspirator, or person, or defendant, aider and abettor was neither present or had knowledge of the physical killing or the weapon used.

(Emphasis added.) While this instruction also was not ideal, it captured the essence of how a jury might properly infer an aider and

...bettors" appears to be nothing more ...n artful boilerplate reiteration that ...ndividuals could be found guilty ...s principals ("defendants or co-defen... or as "aiders and abettors." *See* ...8 2d at 407–08. The phrase did not ...t... jury that it could convict peti... by finding intent to kill in his code... ...aiders and abettors; rather, it ...ed ...e jury that they could find that ...er had intent to kill as a defendant *or* ...endant *or* an aider and abettor. This ... is supported by the fact that the ...e... phrase follows close on the heels ...court's unequivocal statement that ...s... o kill is an element of the crime ...r... d murder." Furthermore, in its ...ions, the court stressed at least twice ...jurors "must separately consider the ...s... plicable to each of the defendants ...e or she were separately tried" and ...r their conclusions about one defen... ...inf... ence the verdict as to the other ...nts.

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...ad...ied.) While this instruction ...pt... eal, it captured the essence of ...m...nt properly infer an aider and

abettor or conspirator's purpose to kill as explained by the Ohio Supreme Court. *See Scott*, 400 N.E.2d at 382; *Lockett*, 358 N.E.2d at syllabus ¶¶ 3–4. Accordingly, we conclude that petitioner has not demonstrated a reasonable likelihood that the jury interpreted the instructions, taken as a whole, to permit petitioner's conviction without proof that he himself had the requisite intent to kill.[2]

[4] Petitioner suggests, however, that the prosecutor's closing argument compounded the potential for jury confusion. The prosecutor informed the jury that to obtain a conviction on a conspiracy theory in Ohio,

> [t]he State is bound to prove to a jury two things. First, that the crimes alleged have been committed.... The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.

The trial court overruled defense counsel's objection to this misstatement of Ohio law. We agree that this improperly suggested that the prosecution need not make an independent showing of intent as to each defendant in order for conspiracy liability to attach.

Nevertheless, even if this remark, in conjunction with any confusion engendered by the court's instructions on mens rea, could be said to have abridged petitioner's constitutional rights, we conclude that these errors were not of such magnitude that they "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, — U.S. at —, 113 S.Ct. at 1722. Petitioner argues that the instructions permitted the jury to find him guilty as an accomplice or conspirator by imputing to him the intent of the principals. However, all of the evidence upon which the jury could have relied to establish petitioner's guilt pointed to his guilt as a principal.[3] Petitioner and Lloyd Allen were in petitioner's bar when Henry Podborny entered, and petitioner exited his establishment with Podborny's wallet and other possessions just minutes later. One witness testified that petitioner had told him that he and Allen had killed a man and placed his body in the field next to the witness' home, where Podborny's corpse was in fact discovered. In addition, physical evidence admitted at trial tended to show that Podborny was killed in petitioner's bar. Authorities found blood of Podborny's type spattered on the walls of petitioner's saloon and discovered paint on Podborny's body that was similar to the paint in the bar. Finally, the prosecutor consistently portrayed petitioner to the jury as a principal. Consequently, any error by the trial court pertaining to the intent of conspirators or aiders and abettors did not injuriously influence the jury's decision to convict petitioner as a principal.

2. We recognize that in *Clark v. Jago*, 676 F.2d 1099 (6th Cir.1982), this court overturned an Ohio aggravated murder conviction for *Sandstrom* error in instructions that bear some similarity to those given here. *Clark*, however, is both distinguishable on the facts and outdated as a matter of law. In this case, unlike *Clark*, the jury charge provided an adequate statement of the way an aider and abettor's intent may be inferred in Ohio. *See Clark*, 676 F.2d at 1105 (noting that court failed to provide this mechanism to the jury). In addition, the court in *Clark* had charged that defendant "and/or his accomplice" must possess the requisite intent to kill. *Id.* Such an instruction more clearly suggests that intent by only one of the two would suffice for conviction of both defendants. In contrast, the court's reference in petitioner's case to "defendants or co-defendants or aiders and abettors" more likely indicates that the court was merely using three different labels for all three defendants as a group. Any implication that each of the three defendants need not possess the required mens rea is much weaker. However, even if we deemed these factual distinctions insignificant, the legal standards upon which *Clark* based its holding have been superseded by more recent Supreme Court decisions, which have changed both the general standard for habeas review of constitutional trial errors, *Brecht*, — U.S. at —, 113 S.Ct. at 1722, as well as the specific test for constitutional errors in jury instructions. *Estelle*, — U.S. at — & n. 4, 112 S.Ct. at 482 & n. 4. *Clark* therefore provides no support for petitioner's claim.

3. The court's instructions on defendant's liability as a principal clearly required the jury to find that "the killing was done purposely and ... with prior calculation and design."

IV.

The district court also held that several rulings of the trial court on the admission of prejudicial evidence, together with the prosecutor's inflammatory closing remarks, deprived petitioner of a fundamentally fair trial. After a careful review of the record, we conclude that these errors were not of constitutional dimension, but were at most errors in the application of state law. As the decisions of both the Supreme Court and this circuit make clear, "federal habeas corpus relief does not lie for errors of state law" because "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *E.g., Estelle*, — U.S. at —, 112 S.Ct. at 480; *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir.), *cert. denied*, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). Under federal constitutional standards, the trial court's evidentiary rulings and the prosecutor's comments were not so prejudicial, either individually or in combination, that they rendered petitioner's trial fundamentally unfair.

V.

For the foregoing reasons, we **reverse** the judgment of the district court conditionally granting the writ of habeas corpus.

Harry E. FLEISCHHAUER; Louis B. Updegrove; Roger Houston; Bruce I. Forrester; Kathleen D. Forrester; Robert P. Gill; Daniel E. Wright; Carol A. Wright; Gordon M. Earle; Ref Productions, Ltd.; Dennis M. Harrington; Charles Mueller; C.T. Lee; James Ralph; Natividad M. Aumentado; David Forrester; Robert Mournighan; Ona L. Mournighan; Joseph Reisinger; Ken W. Chambers; Charles E. Judd, d/b/a C.E. Judd & Associates, Plaintiffs–Appellants,

v.

C. Elvin FELTNER, Jr.; Palm Beach Properties, Inc., a/k/a Palm Beach Films, Inc.; Metropolitan Properties, Inc., a/k/a Metropolitan Films, Inc.; Robert J. Levine; C.E. Feltner, Jr., d/b/a Fleischhauer, et al. v. Feltner, et al. Metropolitan Films, Inc., Defendants–Appellees.

Nos. 92-3337, 92-3461 and 92-3775.

United States Court of Appeals, Sixth Circuit.

Argued June 10, 1993.

Decided Aug. 20, 1993.

Action was brought under Racketeer Influenced and Corrupt Organizations Act (RICO). After being awarded sizeable verdict, plaintiff sought attorney fees. The United States District Court for the Southern District of Ohio, Carl B. Rubin, J., awarded fees, and plaintiffs appealed. The Court of Appeals, Wellford, Senior District Judge, held that: (1) supplemental fee application filed after date specified for filings could be disregarded; (2) attorney fees could be denied for time spent by attorney who failed to inform district court that he had been disbarred; (3) hourly rate of $150 was within district court's discretion; and (4) reduction of fees for unsuccessful claims was within district court's discretion.

Affirmed.

1. Federal Civil Procedure ⇐2742.5

District court's order requiring that all documents pertaining to attorney fees should be filed by specific date, rather than within specific number of days, was neither invalidated nor extended by reason of fact that date specified fell on Saturday; computation under Federal Rules of Civil Procedure, and

No. 92-3763

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

OCT 04 1993

LEONARD GREEN, Clerk

ROBERT O'NEAL,

Petitioner-Appellee,

v.

TERRY L. MORRIS, SUPT.,

Respondent-Appellant.

ORDER

BEFORE: MILBURN, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk pe

United States District Court

SOUTHERN DISTRICT OF OHIO

ROBERT O'NEAL

V.

TERRY MORRIS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-1-86-976

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED**.

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED**. The State of Ohio or the County of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

This case is DISMISSED and TERMINATED on the docket of this Court.

Judge 4845
Misc. 4847
Journal
Motion #
Issue CM 72
Card
N/S
Docketed

July 27, 1992
Date

KENNETH J. MURPHY
Clerk

(By) Deputy Clerk D. A. Myers

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CLERK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner

v. C-1-86-976

TERRY MORRIS,

Respondent

Judge 481
Mag. 481C
Journal
Motion #
Issue Clm
Card
N/S
Docketed

ORDER

Petitioner Robert O'Neal brings this action through court-appointed counsel for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges the constitutionality of his convictions by a jury in the Cuyahoga County, Ohio Court of Common Pleas for aggravated murder, kidnapping, and aggravated robbery. This matter is before the Court upon a Report and Recommendation and a Supplemental Report and Recommendation of the United States Magistrate Judge (doc. nos. 68, 74), respondent's objection (doc. no. 76), petitioner's response (doc. no. 79), petitioner's motion for bail (doc. no. 72), and a pretrial services report (doc. no. 77).

I.

The Magistrate Judge recommends that this Court issue a writ of habeas corpus on the ground that O'Neal was not provided a fundamentally fair trial due to the constitutionally defective jury

instructions, the prosecutor's prejudicial misconduct, and the admission of certain prejudicial evidence.[1]

Upon a *de novo* review of the record in light of respondent's objections, the Court finds that respondent's contentions have either been adequately addressed and properly disposed of by the Magistrate Judge or present no particularized arguments that warrant specific responses by this Court. The Court finds that the Magistrate Judge accurately set forth the controlling principles of law and properly applied them to the particular facts of this case and agrees with the Magistrate Judge that petitioner was deprived of a fundamentally fair trial in violation of his rights under the Due Process Clause.

Accordingly, the Court hereby **ADOPTS** the Report and Recommendation and the Supplemental Report and Recommendation of the United States Magistrate Judge (doc. nos. 68, 74).

II.

Petitioner seeks an order directing the state to release him on bail and suspend the execution of his sentence (doc. no. 72). He argues that release on bail is proper because the violations of

[1] The Magistrate Judge also recommends that in the event this Court does not adopt these recommendations, this Court should grant a writ of habeas corpus on petitioner's claim that he was deprived of his rights under the Due Process Clause during his state appeal of his convictions. Given this Court's agreement with the Magistrate Judge's primary conclusions, there is no need to reach petitioner's claim that he was deprived of due process during his state appeal.

his constitutional rights during his trial are substantial meritorious claims of law that warrant a new trial. Petitioner asserts that the following exceptional circumstances justify release on bail: He is sixty-one years of age; he has served over eleven years on the sentences imposed in this case; he filed the present habeas corpus action over five and one-half years ago; he is factually innocent of the crimes, as demonstrated by the trial record and as supported by certain testimony during the evidentiary hearing held by the Magistrate Judge; he has substantial business and family ties to the Cleveland area, and; he has numerous friends in Cleveland.

Respondent, remarkably, has not filed a response to petitioner's motion for bail.

The factors pertinent to determining whether a successful habeas corpus petitioner is entitled to bail or bond pending appeal are set forth in ***Workman v. Tate***, 958 F.2d 164, 166 (6th Cir. 1992); ***see also*** Fed. R. App. P. 23. Weighing the factors in light of the specific circumstances of this case, this Court finds that petitioner's release on bail is not warranted at this time. The factors weighing against releasing petitioner on bond pending his appeal include the fact that petitioner has placed himself in positions where acts of violence have occurred, he stands accused of committing three violent felony offenses upon which there exists "substantial" evidence (doc. no. 68, p. 47) of his guilt, the Federal Pretrial Services Report recommends that his motion for bond be denied, and the State of Ohio's interest in continuing

petitioner's rehabilitation and ensuring public safety. ***See Workman***, 958 F.2d at 166. Since these significant factors outweigh the harm petitioner may incur by remaining incarcerated pending his new trial, his motion for bail is not well taken at this time. ***Cf. id.***

ORDER

This Court hereby **ORDERS** that:

(1) Petitioner's motion for bail and suspension of execution of sentence (doc. no. 72) is **DENIED**.

(2) Petitioner's application for a writ of habeas corpus (doc. no. 1) is **CONDITIONALLY GRANTED**. The State of Ohio or the County of Cuyahoga should retry petitioner within ninety (90) days from the date of this Order. Should no further action be taken by the State of Ohio or the County of Cuyahoga, within ninety (90) days of the date of this Order, including retrial of petitioner, the Court **ORDERS** respondent to release petitioner, such release being final and unconditional.

IT IS SO ORDERED.

Herman J. Weber, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs. CASE NO. C-1-86-0976

TERRY MORRIS,

Respondent

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NOTICE

Attached hereto is the Supplemental Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on May 11, 1992. Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,
Petitioner

vs Case No. C-1-86-0976

TERRY MORRIS,
Respondent

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SUPPLEMENTAL REPORT AND RECOMMENDATION

Petititoner Robert O'Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 22, 1992, we issued a report and recommendation recommending that the petition be denied with respect to two of O'Neal's claims for habeas corpus relief and granted with respect to his claims that jury instructions were constitutionally defective and that prosecutorial misconduct and erroneously admitted evidence deprived him of a fundamentally fair trial. (Doc. 68).

On April 15, 1992, the district court judge issued an order adopting the portion of the report and recommendation recommending denial of two of O'Neal's claims for habeas corpus relief. (Doc. 73). The Court also adopted our conclusion that "petitioner's convictions are supported by substantial but not overwhelming evidence." *Id.* at 2. However, the

Court ordered the petition recommitted to the undersigned Magistrate Judge for reconsideration of O'Neal's claims of constitutionally defective jury instructions and that he was deprived of a fair trial because of prosecutorial misconduct and erroneously admitted evidence "in light of the doctrine espoused in *Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims." *Id.* The Court further stated:

> The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and the commentary thereunder. . . . This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

Id. at 2-3.

The *Pinkerton* doctrine relates to O'Neal's claim that the jury instructions were constitutionally defective because they relieved the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. In our previous report and recommendation, we found that the instructions were confusing because they failed to set forth the state law requirement that each defendant have the independent intent to commit the offenses charged in order to be found guilty. (Doc. 68, p. 21). We concluded that the erroneous instructions constituted a due process violation because a reasonable juror could have interpreted them to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the requisite intent of other participants in the alleged conspiracy. *Id.* at 24.

In *Pinkerton,* the Supreme Court held that a defendant can be convicted of the substantive offenses charged against him, even though there is no evidence to show that he participated directly in the

commission of the offenses, if it is found that he was a party to an unlawful conspiracy at the time the offenses were committed and the offenses charged were in fact committed in furtherance of the conspiracy. 328 U.S. at 645-47. The Court reasoned:

> Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Yet all members are responsible, though only one did the mailing. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle.

Id. at 647 (citations omitted). The Court refused to extend its holding to situations where the substantive offense committed by a co-conspirator "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48.

Section 3.10 of the Sixth Circuit's Pattern Criminal Jury Instructions is based on the *Pinkerton* case. Under this section, a defendant can be found guilty of substantive offenses committed by others if the government proves beyond a reasonable doubt that the defendant was a member of an unlawful conspiracy; that while he was a member of the conspiracy, one or more of the other members

committed the substantive offense; that the offense was committed to help advance the conspiracy; and that the offense was within the reasonably foreseeable scope of the conspiracy. The instruction provides: "This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understands it."

Under Ohio's complicity statute, which provides the statutory basis for the charges against O'Neal on the theory of his participation as an accomplice or co-conspirator, aiders and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. Ohio Rev. Code § 2923.03(A); *see also State v. Lockett,* 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds,* 438 U.S. 586 (1978). In Ohio, a defendant cannot be convicted of aggravated murder solely because he engaged in a felony that resulted in a murder; rather, the prosecution must prove a defendant's purpose to kill as an essential element of the offense even in cases where it proceeds on a complicity theory. *State v. Scott,* 61 Ohio St. 2d 155, 166 (1980); *see also Clark v. Jago,* 676 F.2d 1099, 1103-04 (6th Cir. 1982), *cert. denied,* 466 U.S. 977 (1984). The prosecution may prove intent to kill either by producing direct evidence of intent or by showing that the participants in a felony entered into a common plan and the aider and abettor or co-conspirator knew either that a dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment was reasonably likely to produce death. *Scott,* 61 Ohio St. 2d at 165; *Lockett,* 49 Ohio St. 2d at 59-60. As in *Pinkerton,* this means that under Ohio law intent to kill can be inferred from the existence of a criminal conspiracy where a homicide could reasonably be foreseen as a natural consequence arising from the furtherance of the conspiracy. *See Lockett,* 49 Ohio St. 2d at 60-62. For example, evidence that a defendant participated in the planning and commission of an armed robbery, where it is reasonably foreseeable that the victim's life would be endangered, is sufficient to establish intent to kill. *Lockett,* 49 Ohio St. 2d at 62. On the other hand, a jury instruction which would permit a defendant to be found guilty of aiding and

abetting a murder solely based on evidence that he was implicated in the victim's kidnapping improperly relieves the State of its burden of proving intent to kill. *Scott,* 61 Ohio St. 2d at 166-67.

In this case, the jury instructions on the intent element of the offenses charged and the complicity theory of liability were so confusing and vague that a reasonable juror could have interpreted them to mean that the intent of one co-conspirator could be imputed to O'Neal as a participant in a conspiracy, even if the offense was not within the reasonably foreseeable scope of that conspiracy as required under *Pinkerton* and Ohio case law. In instructing the jury on the intent element of the substantive offenses of aggravated murder, kidnapping and aggravated robbery, the court often referred to "the defendants or co-conspirators or aiders and abettors" as a group, without explicitly setting forth the intent required of each defendant individually either as a direct participant in the offense or as a participant in a conspiracy. (*See* Doc. 68, App. A, pp. 2, 5, 8). In addition, the court never instructed the jury that in order to find the individual defendants guilty of the substantive offenses under a conspiracy or complicity theory, it had to find that the offenses could reasonably be foreseen as necessary or natural consequences of the conspiracy. *See id.* at 9, 14, 16. Indeed, the court instructed the jury on conspiracy and complicity only in general terms, without discussing the separate offenses charged or the scope of the conspiracy alleged against defendants. *See id.* at 8-16.

Therefore, without further explanation, a reasonable juror could have concluded that O'Neal could be found guilty of the crimes of kidnapping, robbery and murder simply based on his participation in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to the commission of the offenses. Also, a reasonable juror could have interpreted the instructions to mean that if O'Neal were found to be a member of a kidnapping conspiracy, he could be found guilty of aggravated murder resulting from the kidnapping even if the murder was not within the reasonable contemplation of the participants in the kidnapping scheme. *Cf. Scott,* 61 Ohio St. 2d at 166-67.

The instructions as a whole were insufficient to dispel the possibility of juror confusion. When instructing on the intent element of

aggravated murder, the court stated on one occasion:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: . . . where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

(Doc. 68, App. A, p. 2). This instruction, which was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations, properly sets forth an appropriate method for inferring an accomplice's or co-conspirator's intent to kill based on his participation in a conspiracy. *See Scott*, 61 Ohio St. 2d at 165; *Lockett*, 49 Ohio St. 2d at 59-60.

However, no such instruction was given regarding the requisite intent of an accomplice or co-conspirator on the other charges of aggravated robbery and kidnapping. Moreover, the instruction was stated in pro-prosecution terms of a finding of a guilt. The court gave no further instructions to emphasize to the jury that before it could find the defendants guilty of aggravated murder based on their participation in a conspiracy, it had to find that the unlawful object of the conspiracy and the manner of its accomplishment was reasonably likely to produce death.

The instructions given on complicity and conspiracy further confused matters because the court never stated that the substantive offense had to be a reasonably foreseeable consequence of the conspiracy before the jury could find the defendants guilty of the offense solely because of their participation in the conspiracy. The court did not list

"reasonable foreseeability" as a condition for finding co-conspirator liability. (*See* Doc. 68, App. A, p. 9). Moreover, without mentioning the reasonable foreseeability component, the court stated: "Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them . . . is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the -- in furtherance during the time of the conspiracy." *Id.* at 16. At one point in these instructions, the court made the vague statement that "[i]t is enough that the offense charged in the indictment was one that *might* have been contemplated as a result of the conspiracy." *Id.* at 15 (emphasis added).

As discussed in the previous report and recommendation, the risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's misstatement of the law in his closing remarks, which was effectively endorsed by the trial judge when he overruled defense counsel's objections to the remarks. (*See* Doc. 68, pp. 23-24). The prosecutor's comments improperly suggested to the jury that all that was necessary to establish guilt for the crimes charged was proof "that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes." (Tr. 6075-76).

Accordingly, the doctrine espoused in *Pinkerton* does not change our conclusion in the previous report and recommendation that the jury instructions on the intent element of the crimes charged constituted a violation of O'Neal's right to due process of law.

In any event, assuming, *arguendo*, that the jury instructions were not constitutionally defective, we would still recommend a finding that O'Neal was deprived of a fair trial based on the prosecutor's misconduct and the erroneously admitted evidence. We view the prosecutor's misconduct and the admission of inflammatory evidence as far more egregious errors than the confusing jury instructions. As we stated in the previous report and recommendation, "[w]e seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere

created by the introduction of unnecessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions." (Doc. 68, p. 42).

The prosecutor's improper conduct in eliciting the details of O'Neal's killing another man was calculated, highly prejudicial and extensive. *See id.* at 30-39. The introduction of gruesome evidence, coupled with the prosecutor's inflammatory remarks regarding such evidence, was also prejudicial and was done for the express purpose of inflaming the jury's passions. *See id.* at 28-30, 39-40. It is likely that these errors, which were effectively endorsed by the trial judge, caused the jury to abandon its impartiality in weighing the evidence. Although the evidence against O'Neal was substantial, it was not overwhelming and there were substantial credibility issues for the jury to resolve. *Id.* at 47-48. Accordingly, we conclude that the prosecutor's misconduct and the erroneous admission of inflammatory evidence, taken as a whole and within the context of the entire record, deprived O'Neal of a fundamentally fair trial.

Date: 5-8-92

cbc

Robert A. Steinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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Apr 15 10 15 AM '92

ROBERT O'NEAL,

Petitioner

v. C-1-86-976

TERRY L. MORRIS,

Respondent

ORDER

This matter was referred pursuant to 28 U.S.C. § 636 to the United States Magistrate Judge for Report and Recommendation on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254. The matter is before the Court upon the Report and Recommendation of the Magistrate Judge (doc. no. 68) recommending that the Petition for Writ of Habeas Corpus be denied as to certain claims and granted as to certain claims; upon respondent's objections thereto (doc. no. 69), which were not timely filed; petitioner's Motion to Strike Objection (doc. no. 70); petitioner's response to respondent's objections (doc. no. 71); and petitioner's Motion for Bail and Suspension of Execution of Sentence (doc. no. 72).

The respondent failed to file his objections in a timely fashion and failed to serve the petitioner with a Motion for Extension to File Objections.

The respondent has not responded to the petitioner's Motion

to Strike the Objections of the Respondent.

Upon careful consideration of the matters before the Court, and upon conducting a *de novo* review of the record, the Court finds that the Magistrate Judge's conclusion that petitioner's convictions are supported by substantial but not overwhelming evidence should be adopted (doc. no. 68, p. 47).

Accordingly, the Court accepts the factual findings of the Magistrate Judge and hereby **ADOPTS IN PART AND INCORPORATES** into this Order by reference his Report and Recommendation dated January 22, 1992 that O'Neal's Petition for Writ of Habeas Corpus be **DENIED** as to the following:

(a) O'Neal's claim that he should not have been tried with his co-defendants;

(b) O'Neal's challenge to the racial composition of the jury.

As to O'Neal's Petition for Writ of Habeas Corpus based on the claim of constitutionally defective jury instructions and the claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial, the Petition for Writ of Habeas Corpus is **RECOMMITTED** to the Magistrate Judge for reconsideration in light of the doctrine espoused in *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), and the cases spawned by it as they may relate to these claims. The Court incorporates herein by reference § 3.10, Pattern Criminal Jury Instructions of the Sixth Circuit (1991) and

the commentary thereunder, a copy of which is attached. This Court holds that these federal instructions fulfill the requirements of federal due process. The theory of law they represent may impact upon the conclusion of the Report and Recommendation, because the Magistrate Judge found in the record substantial evidence supporting the guilt of the petitioner.

In light of the above, the Court further **ORDERS** that petitioner's Motion for Bail and Suspension of Execution of Sentence (doc. no. 72) is **REFERRED** to the Magistrate Judge pursuant to Rule 10, Rules Governing Section 2254 Cases in the United States District Courts, and 28 U.S.C. § 636(b); and petitioner's Motion to Strike Objection (doc. no. 70) is **GRANTED**, since respondent failed to respond to the Motion to Strike, failed to file timely objections, and failed to file a timely motion for an extension of time in which to file objections to the Report and Recommendation.

IT IS SO ORDERED.

Herman J. Weber, Judge
United States District Court

3.10

PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) Count ___ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count ___ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant

could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

Use Note

This instruction should be used when the government is attempting to convict a defendant of a substantive crime committed by other members of a conspiracy, and there is also some evidence that the defendant personally committed or participated in the commission of the substantive offense.

The language in paragraph (2) should be modified to delete all references to personal commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

Committee Commentary 3.10

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory, and some evidence that a defendant personally committed or participated in a substantive offense.

In *Pinkerton v. United States*, 328 U.S. 640, 645–648, 66 S.Ct. 1180, 1183–1185, 90 L.Ed. 1489 (1946), the Supreme Court held

that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner [committed in furtherance of the conspiracy] may be the act of all." Accord *United States v. Martin*, 920 F.2d 345, 348 (6th Cir.1990) ("The *Pinkerton* doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy."); *United States v. Adams*, 742 F.2d 927, 943–944 (6th Cir. 1984) ("Once a person becomes a member of a conspiracy, he or she may 'be held responsible for all that may be ... done' by co-conspirators."), cert. denied, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985); *United States v. Chambers*, 382 F.2d 910, 914 (6th Cir.1967)) ("Where the substantive offense is committed by one or more conspirators in furtherance of an unlawful activity, all members of the conspiracy are guilty of the substantive offense.").

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, see, e.g., *United States v. Cimini*, 427 F.2d 129, 130 (6th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970), that authority is questionable in light of the United States Supreme Court's decision in *Levine v. United States*, 383 U.S. 265, 266–267, 86 S.Ct. 925, 925–926 15 L.Ed.2d 737 (1966). In *Levine*, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of ... the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton*, *supra*, 328 U.S. at 647–648, 66 S.Ct. at 1184–1185. In *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir.1970), cert. denied, 400 U.S. 1000, 91 S.Ct. 464, 27 L.Ed.2d 462 (1971), the Sixth Circuit treated this statement from *Pinkerton* as creating three separate limita-

tions on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. *Cf. United States v. Frost*, 914 F.2d 756, 762 (6th Cir.1990) ("[A] court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In *Pinkerton*, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." *Id.*, 328 U.S. at 646–647, 66 S.Ct. at 1183–1184. And in *Etheridge*, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. *Id.*, 424 F.2d at 965.

In *United States v. Borelli*, 336 F.2d 376, 385–386 (2d Cir. 1964), cert. denied, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir.1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it". See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 n. 36, 98 S.Ct. 2864, 2886 n. 36, 57 L.Ed.2d 854 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

JAMES M. MURPHY
CLERK

JAN 22 1 52 PM '92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,

Petitioner,

vs. CASE NO. C-1-86-0976

TERRY MORRIS,

Respondent

Judge _____
Mag. _____
Journal ✓
Motion # _____
Issue _____
Card _____
N/S _____
Docketed _____

NOTICE

Attached hereto is the Report and Recommended Decision of the Honorable Robert A. Steinberg, United States Magistrate Judge, which was filed on January 22, 1992 Any party may object to the Magistrate Judge's findings, recommendations and report within ten (10) days after being served with a copy thereof or further appeal is waived. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate Judge, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate Judge's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

JAMES M. MURPHY
CLERK

JAN 22 1 52 PM '92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,
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vs

Case No. C-1-86-0976

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REPORT AND RECOMMENDATION

Petitioner Robert O'Neal, a prisoner at the Chillicothe Correctional Institute in Chillicothe, Ohio, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, the return of writ, the parties' submissions of exhibits and supplemental briefs, as well as evidence and legal arguments presented during two hearings. (Docs. 1, 10, 12, 14, 20, 22, 24, 25, 31, 34, 38, 41, 47, 49, 57, 58, 59, 63, 65, 67).

Procedural Background

On March 27, 1981, O'Neal and five others were indicted by the Cuyahoga County, Ohio grand jury on one count of aggravated murder as defined in Ohio Rev. Code § 2903.01, one count of kidnapping as defined in Ohio Rev. Code § 2905.01, and one count of aggravated robbery as defined in Ohio Rev. Code § 2911.01. (Doc. 10, Ex. B). On July 17, 1981, in a separate trial, a jury found two defendants, Lola Gail

Toney and Gary Gabbard, guilty as charged. *Id.*, Ex. E, p. 2; Tr. 1735; *see also Ohio v. Gabbard,* No. 44207, unreported slip op. (Ohio App. Oct. 25, 1984). Another co-defendant, Leland Waress, pleaded guilty to one count of conspiracy to commit kidnapping. (Doc. 10, Ex. E, p. 2; Tr. 5123).

From September 1, 1981 through October 10, 1981, O'Neal and two co-defendants, Lloyd Allen and Dimple Podborny, were tried before a jury. The jury found them guilty as charged in the indictments. The court sentenced O'Neal to a life term of imprisonment for aggravated murder, a seven (7) to twenty-five (25) year term for aggravated robbery, and a seven (7) to twenty-five (25) year term for kidnapping. *Id.*, Ex. A.

O'Neal pursued unsuccessful appeals in the Ohio Court of Appeals, Eighth Appellate District, and in the Ohio Supreme Court. (Doc. 10, pp. 2-4).

O'Neal then filed his pro se petition for a writ of habeas corpus in this Court raising eight grounds for relief. (Doc. 1). We appointed counsel from the Ohio Public Defender's Office to represent O'Neal. (Doc. 26).

O'Neal contends that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5). He claims that the prosecutor improperly exercised his peremptory challenges to excuse jurors solely on the basis of their race. (Doc. 31, pp. 9-21). He also argues that he was denied his rights under the fourteenth amendment when the Ohio Court of Appeals failed to address an issue he raised in his memorandum in support of his appeal. (Doc. 49, pp. 6-7, 9).

The majority of O'Neal's claims, however, concern his contention that he was denied his right to a fundamentally fair trial under the due process clause of the fourteenth amendment. O'Neal argues that the effect of five trial errors, when considered both alone and cumulatively, deprived him of a fair trial. These five alleged errors concern two claims

of constitutionally defective jury instructions, denial of his rights under the confrontation clause of the sixth amendment, prosecutorial misconduct, and the prejudicial admission of inflammatory evidence. *Id.* at 8-9.

Factual Background

The charges against O'Neal arose from the events leading to and surrounding the death of Henry Podborny, the owner and manager of the West Point Pallet Company in Chicago, Illinois. On January 29, 1981, Mr. Podborny's estranged wife lured him from his home near Chicago, Illinois to Cleveland, Ohio by pretending she wanted to resolve their marital difficulties. On April 24, 1981, his dead body was discovered in a field in Cleveland, Ohio.

The six individuals charged with the kidnapping, robbery, and murder of Mr. Podborny were O'Neal, the owner of an unlicensed saloon[1] in Cleveland; Lloyd Allen, O'Neal's employee and friend; Dimple Podborny, Mr. Podborny's wife; Lola Gail Toney, Mrs. Podborny's daughter-in-law by a prior marriage and O'Neal's friend, whom O'Neal had employed as a bookkeeper for a number of years in the past (Tr. 1749-50); Gary Gabbard, Toney's brother; and Leland Waress, an acquaintance of Mrs. Podborny. James McLean was also a member of the group involved in the plot against Mr. Podborny. McLean assisted law enforcement authorities in their investigation and testified at O'Neal's trial. He was not charged. (Tr. 3236).

The following facts are, in many respects, disputed. However, the version presented is supported by substantial evidence and is consistent with the jury's verdict. The events leading to the death of Mr. Podborny began in May 1980 when Mrs. Podborny asked her son's wife, Toney, if she knew anyone who could provide her with physical protection from Mr. Podborny. (Tr. 1762-63; 5349-50). Between 1969 and 1979, Mrs. Podborny's marriage to Mr. Podborny had been "perfect." (Tr. 5349). In

[1] During the evidentiary hearing the parties agreed that O'Neal's saloon, referred to in the record as a restaurant, a bar, a "cheap spot" or a "cheat spot," was an unlicensed saloon where liquor was sold after hours.

1980, however, the Podbornys experienced marital problems and separated. (Tr. 5350-51). In May 1980, Mrs. Podborny and her children from a prior marriage began receiving threats, apparently from individuals who were following the instructions of Mr. Podborny. (Tr. 5349). As a result of these threats, Mrs. Podborny informed Toney that she wanted to hire someone to protect her. (1762-63).

Toney then contacted McLean, whom she had met when she began working for O'Neal. (Tr. 1752). Toney and McLean devised a plan wherein she would introduce McLean to Mrs. Podborny as "Stan," a man with connections to organized crime, in order to convince Mrs. Podborny to pay $5,000 for physical protection. (Tr. 1768-76).

In June 1980, Toney and McLean met Mrs. Podborny and one of her daughters in Richfield, Ohio. Mrs. Podborny agreed to pay McLean $5,000, and asked him to hold her ring as collateral while she returned to Chicago to obtain the money. After the meeting, Toney and Mrs. Podborny travelled to Chicago where Mrs. Podborny paid Toney $5,000. Toney later gave McLean $2,500 as his share. (Tr. 1770-82, 2947-55, 2962-64).

In July 1980, McLean persuaded acquaintances to make threatening telephone calls to Mrs. Podborny to convince her that she continued to need protection. (Tr. 2964-66). In August 1980, Mrs. Podborny paid Toney an additional $10,000 for protection. Toney, in turn, gave McLean $2,000. (Tr. 2981-82). Mrs. Podborny paid Toney because she was terrified, she believed her life was in danger, and she trusted Toney. (Tr. 5357-59).

In August 1980, Toney travelled to Chicago and met with Mrs. Podborny. Mrs. Podborny informed Toney that she wanted to hire someone to murder Mr. Podborny. (Tr. 1784-86). Toney contacted McLean to discuss the amount they would charge Mrs. Podborny for arranging the killing.[2] They also planned to tell Mrs. Podborny that

[2] Toney disputed the fact that she and McLean intended to arrange the killing of Mr. Podborny. Toney, an admitted liar, Tr. 2120, repeatedly testified that she only pretended to arrange the killing in order to obtain more money from Mrs. Podborny. *See, e.g.*, Tr. 1790.

"Sonny" (a non-existent person) would kill Mr. Podborny.[3] A few days later, Mrs. Podborny paid Toney $24,400. Toney later gave McLean $1,000. (Tr. 1784-1818; 2966-29).

According to Toney, she telephoned O'Neal, her long-time friend and former employer. O'Neal travelled to Chicago. O'Neal and Toney discussed the fact that Mrs. Podborny wanted to have her husband killed. Toney claimed she gave O'Neal $6,500. (Tr. 1807-08; 1818-19; 4043-45; 4840-41). O'Neal had met Mr. and Mrs. Podborny about eight years earlier. At that time, Toney was O'Neal's bookkeeper in Cleveland. Toney introduced O'Neal to Mrs. Podborny apparently because Mrs. Podborny wanted to purchase a saw from O'Neal. Following the sale, O'Neal delivered the saw to the Podbornys' home near Chicago where he met Mr. Podborny. Between that time and August 1980, O'Neal did not again encounter Mr. Podborny. (Tr. 1826-27; 4835-37). Toney claimed she arranged a meeting between O'Neal and Mrs. Podborny, apparently during August of 1980. At that meeting, Toney alleged O'Neal pretended to be employed by "Sonny" to protect Mrs. Podborny from her husband. (Tr. 1820-21).

In late August 1980, Toney travelled to Chicago in order to calm Mrs. Podborny, who was upset because Mr. Podborny had not yet been killed. Mrs. Podborny informed Toney that she wanted Mr. Podborny killed at his business rather than at home. (Tr. 1798). In early September 1980, McLean travelled to Chicago and met with Toney and Mrs. Podborny. They discussed her impatience with the inaction. McLean suggested poisoning Mr. Podborny, but Mrs. Podborny rejected this idea. (Tr. 1812-13). Following the meeting, McLean and Toney reconnoitered Mr. Podborny's pallet company in order to plan a robbery. (Tr. 1813). Toney carried a .38 caliber revolver during the reconnaissance. (Tr. 3243-44).

In September 1980, Mrs. Podborny filed a petition for dissolution of marriage. (Tr. 1806, 5352). In her petition for dissolution, she alleged that her husband and two others were conspiring to murder her. (Tr.

[3] Toney also knew a "loan shark" named Sonny Pace. She testified, however, that Sonny Pace and the fictional "Sonny" were not the same person. (Tr. 1808-09; *see also* 3064-65).

5352-53).

In late September 1980, Mrs. Podborny left her home near Chicago and moved to Cleveland to live with her son and Toney. (Tr. 1822-23). Toney alleged she spoke with O'Neal nearly every day during this time. Although O'Neal was experiencing financial difficulties, she said she did not give him any more money. (Tr. 1822-23).

After living in Cleveland for several weeks, Toney and Mrs. Podborny drove to Chicago for two days to attend a hearing in connection with the dissolution action. Toney alleged that O'Neal and Allen also travelled to Chicago at this time. Toney, Allen, and Mrs. Podborny attended the hearing, during which the court gave Mrs. Podborny permission to re-enter her Chicago home to retrieve her property. O'Neal did not attend the hearing. Following the hearing, Toney, Allen and Mrs. Podborny went to the Podborny residence. O'Neal did not accompany them. When they arrived at the house, Mr. Podborny and several grandchildren were there. At some point, Mr. Podborny experienced a heart attack. Paramedics were summoned and he survived. Later that evening, O'Neal allegedly asked Mrs. Podborny why she had not let Mr. Podborny die. Mrs. Podborny responded that she could not because the grandchildren were present. O'Neal, Toney, and Mrs. Podborny returned to Cleveland together. (Tr. 1824-1832).

During November 1980, Mr. Podborny frequently telephoned Mrs. Podborny. (Tr. 1834). Toney and O'Neal allegedly talked "just about daily," because he was still experiencing financial difficulties. *Id.*

In December 1980, Mrs. Podborny asked Toney to contact Leland Waress, an individual with connections to the Hell's Angels motorcycle club, to ask him to arrange to have Mr. Podborny killed. (Tr. 1836-37). They also discussed kidnapping Mr. Podborny as a method for obtaining access to his money. (Tr. 1842-44). In January 1981, Toney met Waress and discussed not only having Mr. Podborny killed by a member of the Hell's Angels, but also a number of other plans, including a plan to kidnap Mr. Podborny and hold him in the basement of O'Neal's saloon in Cleveland. (Tr. 1840).

The conspirators eventually decided to have Mrs. Podborny lure Mr. Podborny to Cleveland under the guise of reconciling their marital problems. While Mr. Podborny was in Cleveland, Toney claimed O'Neal would kidnap and hold Mr. Podborny in the basement of his saloon while the others robbed the Podborny residence and the pallet company in Chicago. (Tr. 1836-1851). They would then return Mr. Podborny to Chicago, where he would be "given some medication and some whiskey and turned loose." (Tr. 1842).

At some point, Toney contacted her brother, Gary Gabbard, to obtain his help in robbing Mr. Podborny's residence and business. Waress told Gabbard that Toney had suggested that one way to avoid problems following the robbery was to murder Mr. Podborny. (Tr. 5173-5239). Gabbard agreed that killing Mr. Podborny was a possibility, because "dead people don't talk." (Tr. 5229).

In late January 1981, Toney and Waress met in Independence, Ohio. Toney told Waress that O'Neal had agreed to hold Mr. Podborny while the others robbed his residence and business. She showed Waress a list of Mr. Podborny's bank accounts and the amount of money in each account. They discussed the possibility of having McLean pose as Mr. Podborny after the kidnapping and murder, because McLean resembled Mr. Podborny. Following this meeting, Waress was excluded from the plan, apparently because the others decided they did not need him. Although Waress attempted to locate Toney and O'Neal, he was never able to do so. (Tr. 5173-5239).

Toney testified that, on January 29, 1981, the following events occurred. Mr. Podborny flew to Cleveland, Toney met him at the Cleveland airport and drove him to O'Neal's saloon. Toney left Mr. Podborny in front of the saloon and watched him enter. Between five and ten minutes later, O'Neal exited the saloon and entered Toney's automobile. O'Neal gave Toney Mr. Podborny's wallet, his traveler's checks, a credit card, and his keys. Toney took money from Mr. Podborny's wallet and gave it to O'Neal. She then drove around a nearby corner and stopped. (Tr. 1855-66; 1882-95). A few minutes later, Allen entered the car and told Toney that he had struck Mr.

Podborny with a pipe so that he could not run. (Tr. 1862). The trio did not discuss further what had happened inside the restaurant. Toney understood that Mr. Podborny "was secure. He wouldn't get loose." (Tr. 1863). Toney then drove O'Neal and Allen to another saloon. She left them and proceeded alone to a restaurant, where she telephoned McLean. Toney and McLean met in Richfield, Ohio, where Toney gave McLean Mr. Podborny's traveler's checks, credit card, and driver's license. They discussed several plans to obtain the money from Mr. Podborny's bank accounts. Later that evening, Toney gave Mrs. Podborny the wallet and keys. (Tr. 1855-96).

On January 30, 1981, Toney, Mrs. Podborny, Gabbard, and three others drove to Chicago. Toney, Mrs. Podborny, and Gabbard went to Mr. Podborny's home, where they found firearms and two coin containers. They also went to the pallet company, where Mrs. Podborny opened a safe, but did not find any money. They then returned to Cleveland. (Tr. 1896-1909).

During February and March 1981, Toney, Mrs. Podborny, and McLean attempted to obtain money from Mr. Podborny's bank accounts by establishing a bank account in Ohio under the name "Dimple Pallet Company" and transferring money from Mr. Podborny's bank accounts in Chicago to the Ohio account. (Tr. 1928-29; 1934-38; 3017-25). To avoid arousing suspicion over Mr. Podborny's disappearance, Toney, McLean, and Mrs. Podborny attempted to make it appear as though Mr. Podborny was travelling in different areas of the country. To this end, McLean, who resembled Mr. Podborny, flew to Florida posing as Mr. Podborny. Mrs. Podborny and Toney fabricated a letter that appeared to have been written and mailed by Mr. Podborny from Buffalo, New York. Mrs. Podborny later assured an employee at the pallet company that Mr. Podborny was in Florida and that she had received a letter from him that he mailed from Buffalo, New York. (Tr. 1930-1956).

O'Neal allegedly told Toney during February and early March 1981 that Mr. Podborny "was okay," (Tr. 1934, 1939). She informed McLean that O'Neal "wanted $500.00 for keeping Hank." *Id.* Toney claimed she gave O'Neal $300 in mid-March 1981. (Tr. 1941-45). By

late March, Toney believed that Mr. Podborny was no longer alive. (Tr. 1945-46). The record is not clear why she reached that conclusion. *See id.*

In mid-February 1981, McLean was arrested by FBI agents for forging Mr. Podborny's traveler's checks. McLean informed the agents that he knew about the disappearance of Mr. Podborny, and he agreed to assist them in locating him. On several occasions between March 17, 1981, and March 25, 1981, McLean met with Toney. With McLean's consent, the FBI recorded their conversations. The tapes, containing information regarding the participation of Toney and Gabbard in Mr. Podborny's kidnapping and murder, were admitted into evidence at O'Neal's trial. (Tr. 4783-90). (Doc. 10, Ex. D, p. 7).

On April 24, 1981, a dead body was found in a field in Cleveland. *Id.* On April 25, 1981, Dr. Lester Adelson, of the Cuyahoga County Coroner's Office, performed an autopsy on the body. (Tr. 3707). He determined that the victim had been struck at least five times in the head, and shot once in the forehead. (Tr. 378-09). The combination of these injuries caused death. (Tr. 3715). The victim had been dead "for a period of at least weeks." (Tr. 3711). Dr. Adelson examined the entire body and did not discover any injuries below the neck. (Tr. 3717). The body was later identified as Henry Podborny. (Tr. 3630-33).

OPINION

I. O'Neal's First Claim Is Not Cognizable In Federal Habeas Corpus

O'Neal argues that since he was charged with a capital offense, he could not be tried with his co-defendants absent strict compliance with Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20. (Doc. 1, p. 5; Doc. 12, p. 5, Doc. 49, p. 11).

A federal court may review a state prisoner's habeas corpus petition only on the ground that the challenged confinement violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a

perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988).

O'Neal's first claim is not cognizable in the instant action, because he seeks to raise an issue of state law - whether the trial court erred in denying his motion for a mistrial under Ohio R. Crim. P. 14 and Ohio Rev. Code § 2945.20.

II. O'Neal's Challenge To The Racial Composition Of The Petit Jury Cannot Be Recognized

O'Neal argues that his rights under the sixth and fourteenth amendments were violated when State's counsel exercised his peremptory challenges to exclude six individuals from the petit jury solely on the basis of race. (Doc. 31, pp. 9-21). O'Neal concedes that *Batson v. Kentucky,* 476 U.S. 79 (1986), does not apply retroactively to the instant action, leaving him the "insurmountable" burden of establishing a prima facie case of racial discrimination under the standards of *Swain v. Alabama,* 380 U.S. 202 (1965). *Id.* at 13-16. Consequently, rather than mounting a fourteenth amendment *Swain*-based challenge, O'Neal argues that his sixth amendment rights were violated based on the standards announced in *Booker v. Jabe,* 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker,* 478 U.S. 1001, *reinstated,* 801 F.2d 871 (6th Cir. 1986), *cert. denied,* 479 U.S. 1046 (1987).

O'Neal's argument cannot be accepted, because the Supreme Court has now determined that the sixth amendment does not prohibit a prosecutor from eliminating prospective jurors on the basis of race. *See Holland v. Illinois,* 493 U.S. 474, 477-87 (1990). To avoid this ruling, O'Neal argues that *Holland* established a "new" rule of constitutional law and, as a result, it cannot be applied retroactively to bar his sixth amendment claim. (Doc. 49, pp. 12-13) (citing *Teague v. Lane,* 489 U.S. 288 (1989)).

Although he correctly states that a new rule of federal constitutional law does not apply retroactively to cases on collateral

review unless it fits one of the *Teague* exceptions, 489 U.S. at 310, this principle does not apply to *Holland*. When the Supreme Court determines, as in *Holland,* that a particular constitutional amendment does not contain a right that might be favorable to convicted defendants, the ruling does not implicate the concerns underlying retroactivity. These concerns focus on the deleterious effects that retroactive application of new rules of constitutional law have on the states, such as forcing states to justify the legality of a convicted defendant's confinement in light of newly evolved constitutional commands, depriving states of the opportunity to finalize criminal proceedings, and undermining the goal of deterring criminal activity. 489 U.S. at 309-10. None of these concerns apply to *Holland*, because convicted defendants cannot benefit from its holding. Consequently, defendants will not seek to collaterally challenge their convictions based on *Holland* and states will not suffer the costs of fending off such challenges.

O'Neal argues that he is entitled to benefit from the holding of *Booker* that the sixth amendment protects against racially discriminatory jury selection, 775 F.2d at 770-71, because *Booker* was in effect in the Sixth Circuit, and therefore "binding on . . . the State of Ohio" during O'Neal's direct state appeals. (Doc. 31, p. 19). O'Neal further argues, "Booker is still the law for the Sixth Circuit." O'Neal also argues that there exists an inequity in denial of retroactivity which prevents him from raising a fourteenth amendment *Batson* claim, while applying retroactivity to the *Holland* decision. *Id.* These contentions lack merit, because the Supreme Court held that the sixth amendment has never prevented a prosecutor from exercising peremptory challenges in a racially discriminatory manner. *See Holland,* 493 U.S. at 478. The sixth amendment right to raise a claim of race-based exclusion in jury selection did not die in *Holland,* it simply never existed. *Booker*, therefore, according to the Supreme Court, is implicitly an incorrect decision. *See Holland*, 493 U.S. at 478.

The aforementioned conclusion is reached with reluctance, because we do not personally agree with the *Holland* decision. The undersigned has, in a previous case, ruled the sixth amendment prohibits discriminatory jury selection. *See*, e.g., *Bell v. Morris*, No. C-1-86-1241, Report and Recommendation (S.D. Ohio June 29, 1989).

Nevertheless, we believe the *Holland* ruling requires the result reached in this case. However, the District Judge should be aware that a contrary analysis has been made by District Judge Spiegel in *Bell v. Morris*; C-1-86-1241 (S.D. Ohio Jan. 8, 1991). Judge Spiegel ruled that the *Holland* decision was not dictated by existing precedent and, therefore, represented a new rule of law that should not be applied retroactively. That decision is presently pending on appeal.

O'Neal's allegations of racially discriminatory jury selection are quite serious. He relies, in part, on the prosecutor's remarkable explanation for exercising his sixth peremptory challenge to exclude a black woman from the petit jury: "she was very defense-minded . . . and the fact that she has already testified for a defendant, and also *on the basis of race.*" (Tr. 1496-97) (emphasis added); *see also Ohio v. Podborny,* 41 Ohio App. 3d 135, 138 (Wiest, J., dissenting). The trial judge then informed the prosecutor that Ohio law provided him an unlimited right to exercise peremptory challenges. (Tr. 1497-98).

Since the Supreme Court has held the sixth amendment does not support O'Neal's challenge to discriminatory jury selection, and since *Batson* does not apply retroactively to O'Neal's conviction, he must rely on the fourteenth amendment as a basis for his claim. *Supra,* p. 10. O'Neal, however, has not attempted to establish a prima facie case of racial discrimination based on the standards of *Swain*. *See* Doc. 31, pp. 9-21.

Accordingly, O'Neal's second claim cannot be recognized as a separate ground for granting a habeas corpus writ.

III. The Trial Court Did Not Violate O'Neal's Rights Under the Confrontation and Compulsory Process Clauses of the Sixth Amendment

O'Neal claims that the trial court violated his rights under the Confrontation Clause of the sixth amendment by limiting his cross-examination of Special Agent Fredrick Graessle of the Federal Bureau of Investigation (FBI).

Graessle was subpoenaed as a witness by co-defendant Dimple Podborny to testify about McLean's role as an FBI informant. Graessle responded to a limited number of questions on direct examination, which previously had been submitted to and approved by the United States Justice Department in accordance with procedures set forth in 28 C.F.R. § 16.21, *et seq.*, regarding the disclosure of any information acquired by an employee of the Department of Justice in the performance of his official duties.[4]

On direct examination, Graessle testified that he was a special agent with the FBI in Cleveland, Ohio and that on March 10, 1981, McLean had asked him about the possibility of obtaining immunity from federal prosecution in return for "turning State's evidence." (Tr. 5081-82). Graessle said that he told McLean that he did not have the power to promise anything "on those lines," but did advise McLean that an Assistant United States Attorney, who was able to make promises regarding prosecution, "was very interested in obtaining McLean's cooperation regarding this matter." (Tr. 5082). When McLean asked Graessle whether there were other federal charges pending against him, Graessle told McLean that he knew of no other federal charges at that time, but that there were other crimes which had been uncovered as a result of the FBI's investigation with which McLean might be charged. *Id.* Graessle further testified that McLean said he might have information that could identify Podborny's killer, as well as when, where, and how Podborny may have been killed. (Tr. 5082-83).

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[4] These federal regulations prohibit Justice Department employees from disclosing such information without prior departmental approval. The regulations further provide:

> If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceedings, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

28 C.F.R. § 16.22(a), (c).

O'Neal's counsel sought to pose additional questions to Graessle on cross-examination, because Graessle had been present when O'Neal made certain incriminating statements to the Cleveland Police on March 26, 1981, and, according to O'Neal, was an "active participant in the gathering of evidence and prosecution of this case." (Doc. 31, p. 38; Tr. 203-17). O'Neal's counsel asked Graessle if he had been involved in the FBI investigation when Podborny's body was found and whether he could tell who provided the information "as to where that body was." (Tr. 5083-84). Graessle refused to answer these questions, stating "I'm not authorized by the Department of Justice to answer that." (Tr. 5084).

The trial court sustained objections to O'Neal's line of questioning after an Assistant United States Attorney explained at side bar that Graessle could not answer questions which had not been previously approved in accordance with federal regulations. (Tr. 5088). The court explained to the jury that "no employee of the Department of Justice may testify without prior authorization ... as to the questions he is going to be asked." (Tr. 5090-91). After the court sustained an objection to another question about Graessle's involvement in the presentation of the case, O'Neal's counsel said he would sit down without asking any further questions even though he had "a lot of other questions [he] would like to ask." (Tr. 5091).

On O'Neal's direct appeal, the Ohio Court of Appeals made the following findings of fact, which are entitled to the presumption of correctness:[5]

> [O'Neal] could have but did not subpoena the FBI Agent. [He] could have but did not submit the required application to the Justice Department. [He] could have but did not request a continuance of the trial so that he could pursue the application requirement.

(Doc. 10, Ex. C, p.8).

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5 *See* 28 U.S.C. § 2254(d); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); *Nichols v. Perini*, 818 F.2d 554, 557-58 (6th Cir. 1987).

O'Neal argues that he should have been allowed to cross-examine Graessle about (1) the circumstances surrounding O'Neal's statements to the police to show the statements were unreliable; (2) the identity of the informant who found Podborny's body and notified the FBI of this fact to discredit the testimony of Wilbur Higgins, who testified that he notified a city inspector of the location of Podborny's body after O'Neal told him where it was; and (3) payments made to McLean for his testimony and by the FBI for his role as an informant in other cases to undermine McLean's credibility with the jury. (Doc. 49, pp. 24-25).

The Confrontation Clause of the sixth amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." One of the main purposes of the right of confrontation is to ensure a defendant's right to impeach and otherwise challenge adverse testimony by way of cross-examination. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984). However, the right of confrontation does not include the right to cross-examine witnesses who have provided favorable testimony. *See United States v. Kindig*, 854 F.2d 703, 708 (5th Cir. 1988); *United States v. Crockett*, 813 F.2d 1310, 1313-14 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987); *United States v. Andrews*, 765 F.2d 1491, 1501 (11th Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986). In determining whether or not a witness has provided adverse testimony implicating a defendant's rights under the Confrontation Clause, the Court must assess the actual content of the witness's testimony, not whether he was called by the prosecution or on behalf of a co-defendant. *United States v. Crockett*, 813 F.2d at 1314; *see also United States v. Kindig*, 854 F.2d at 708-09.

In this case, Graessle was not called as a witness by the prosecution, but by a co-defendant. He did not provide any testimony that could have adversely affected O'Neal's defense. Indeed, the testimony was favorable to O'Neal because it suggested that McLean had a self-interest motive in testifying for the prosecution. In posing additional questions to Graessle, O'Neal's attorney was attempting to elicit further favorable testimony, rather than impeach Graessle or to challenge the testimony he had given on direct examination. O'Neal's

rights under the Confrontation Clause were therefore not implicated by the trial court's limitation of the cross-examination of Graessle to only those areas covered by the authorization granted co-defendant Dimple Podborny.

The right to elicit favorable testimony is encompassed by the sixth amendment right of a defendant "to have compulsory process for obtaining witnesses in his favor." *United States v. Crockett,* 813 F.2d at 1313. The Compulsory Process Clause of the sixth amendment guarantees the criminal defendant's fundamental right to present witnesses in his own defense. *Taylor v. Illinois,* 484 U.S. 400, 408 (1988). The right to offer the testimony of witnesses and to compel their attendance, if necessary, is included in the right to present a defense, which is "a fundamental element of due process of law." *Id.* at 409, quoting *Washington v. Texas,* 388 U.S. 14, 19 (1967). However, although the right of the defendant to present evidence stands on the same footing as other sixth amendment rights, there is a significant difference between the right to compulsory process and other sixth amendment rights, because the availability of the right to compulsory process "is dependent entirely on the defendant's initiative." *Id.* at 410. The decision whether to employ the right to compel the presence and present the testimony of witnesses rests solely with the defendant, and the "very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." *Id.* In the exercise of the right to present witnesses, the defendant must comply, like the prosecution, with established rules of procedure and evidence to assure both fairness and reliability in the trial proceedings. *Id.* at 411 and n.15.

In the instant case, O'Neal's counsel had the opportunity to demand the testimony of Graessle in accordance with the procedures set forth in 28 C.F.R. § 16.21, *et seq.,* but did not do so. Because he failed to exercise his right to compel the presence and present the testimony of Graessle, O'Neal cannot now claim that right was violated. *Cf. United States v. Marino,* 658 F.2d 1120, 1125 (6th Cir. 1981). Furthermore, defense counsel developed much of the same information O'Neal sought from Graessle during the cross-examination of police officers Timothy Patton and Jerry Hruby. (Tr. 3557-58, 4523-31, 4541-42).

Accordingly, O'Neal's claim that the trial court violated his rights under the Confrontation Clause or Compulsory Process Clause of the sixth amendment lacks merit.

IV. The Jury Instructions Regarding Intent Violated O'Neal's Right to Due Process of Law

O'Neal raises two arguments challenging the jury instructions given at trial. First, he argues that the trial court deprived him of a fair trial by giving extensive instructions on conspiracy which forced O'Neal to defend against a conspiracy charge not contained in the indictment. (Doc. 31, pp. 28-30). Second, O'Neal contends that the jury instructions deprived him of his rights under the fourteenth amendment Due Process Clause by relieving the State of its burden of proving beyond a reasonable doubt the intent element for each offense charged. (Doc. 31, pp. 22-26; Doc. 49, pp. 14-15; Doc. 65). According to O'Neal, this occurred when the trial court spoke of intent in terms of "the defendants or co-conspirators or aiders and abettors" as a group, which created the "automatic presumption that if any of the aider and abettors, co-defendants, or co-conspirators possessed the culpable mental state," it could be imputed to all others. (Doc. 49, p. 16). The instructions at issue are set forth verbatim in Appendix A, attached hereto.

A. The Conspiracy Instructions, In and Of Themselves, Did Not Violate O'Neal's Right To Due Process

Under the Due Process Clause of the fourteenth amendment, the charging method employed by a state must give the criminal defendant fair notice of the charges against him so that he may adequately prepare a defense. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Olsen v. McFaul*, 843 F.2d 918, 930 (6th Cir. 1988); *Koontz v. Glossa,* 731 F.2d 365, 369 (6th Cir. 1984); *Watson v. Jago*, 558 F.2d 330, 338-39 (6th Cir. 1977). It is a well established principle of procedural due process that notice of the specific charge, and an opportunity to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in both state and federal criminal proceedings. *Cole*, 333 U.S. at 201; *In re Oliver*, 333 U.S. 257, 273 (1948). *See generally Hovey v. Elliot*, 167 U.S. 409, 414-18 (1897).

In this case, the indictment provided O'Neal with fair notice of the charges against him. The indictment charged O'Neal with aggravated murder, aggravated robbery and kidnapping, and the trial court properly instructed the jury that those were the three counts before it. (Tr. 6157). The court restated the charges against O'Neal at the end of its instructions and discussed the elements of "conspiracy" and "aiding and abetting" solely for the purpose of determining complicity. (Tr. 6177-93). Indeed, the trial judge specifically pointed out when instructing on the elements of "conspiracy" and "aiding and abetting" that the defendants had not been charged with any offense under the Ohio conspiracy statute. (Tr. 6177-78). *Contrast Koontz v. Glossa,* 731 F.2d at 369-70.

In Ohio, a defendant can be charged with complicity either in terms of the principal offense or as an aider and abettor or co-conspirator in the commission of the principal offense. Ohio Rev. Code Ann. § 2923.03(A),(F) (Anderson 1987)(effective Jan. 1, 1974). *See Hill v. Perini,* 788 F.2d 406, 407 (6th Cir.), *cert. denied,* 479 U.S. 934 (1986). "This practice has apparently been established in Ohio for over 100 years." *Id.,* citing *Hanoff v. State,* 37 Ohio St. 178 (1881). This practice, which permits jury instructions on complicity even though the defendant has been charged and tried as a principal, does not deprive the defendant of due process of law. *Id.* at 407-08. Because the practice was settled law in Ohio at the time of O'Neal's trial, O'Neal had notice of the possibility that the judge might instruct the jury regarding aiding and abetting and conspiracy for the purpose of determining complicity. *Id.*

B. The Jury Instructions On The Intent Element Of Each Offense Violated O'Neal's Right To Due Process

The Due Process Clause of the fourteenth amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. *In re Winship,* 397 U.S. 358, 364 (1970). The reasonable doubt standard applies to each element of a criminal offense to minimize the possibility of any fact-finding errors in an attempt to ensure that a state incarcerates only the guilty. *See id.* at 363-

65. The trial court may not instruct a jury in a manner that shifts to a defendant the burden of proving a critical fact in dispute, not only because this violates a defendant's right to the presumption of innocence, but also because it increases the likelihood of an erroneous conviction. *Mullaney v. Wilbur,* 421 U.S. 684, 701 (1975). Where intent is an element of the charged offense, the court may not instruct a jury that the existence of certain facts automatically establishes the element of intent. *Sandstrom v. Montana,* 442 U.S. 510, 521-23 (1952). A jury instruction that creates such a mandatory presumption offends the Due Process Clause because it relieves the State of its burden of proof on an essential element of the charged offense. *Id.*

This case does not involve the use of a mandatory presumption, because the jury was never instructed that it must infer that the defendant had a purpose to commit the charged offenses based on other facts in evidence. *Cf. Clark v. Jago,* 676 F.2d 1099, 1104 (6th Cir. 1982), *cert. denied,* 466 U.S. 977 (1984). However, the principles set forth in *Sandstrom* and *Mullaney* are applicable, because the primary due process concern in those cases was whether the challenged practice had the effect of relieving the State of the burden of proof on an element of the crime charged. *Id.; see also Sandstrom,* 442 U.S. at 521-24; *Mullaney,* 421 U.S. at 699-701. If the challenged instruction is found to have had such an effect, the error will constitute a due process violation unless the instructions as a whole would have prevented a reasonable juror from assuming that the State did not have to prove the defendant's independent intent to commit the crimes charged. *See Francis v. Franklin,* 471 U.S. 307, 314-15 (1985).

In order to determine whether the challenged instructions relieved the State of the burden of proof on the issue of O'Neal's state of mind, it is necessary to examine what is required to establish intent under Ohio's complicity statute. *Cf. Flowers v. Blackburn,* 779 F.2d 1115, 1120 (5th Cir.), *cert. denied,* 475 U.S. 1132 (1986). The statute provides in pertinent part:

> (A) No person, *acting with the kind of culpability required for the commission of an offense,* shall do any of the following:

****

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code[.]

Ohio Rev. Code Ann. § 2923.03 (Anderson 1987)(emphasis added).

Under this statute, aiders and abettors and co-conspirators must have the culpable mental state required for the commission of the principal offense. *State v. Lockett,* 49 Ohio St. 2d 48, 60 (1976), *rev'd on other grounds,* 438 U.S. 586 (1978). The Ohio Supreme Court has held, in the context of the crime of aggravated murder, that a defendant cannot be convicted solely because he engaged in a felony that resulted in a murder; rather, the prosecution must always prove intent to kill, including cases where it proceeds on a complicity theory. *State v. Scott,* 61 Ohio St. 2d 155, 166 (1980); *see also Clark v. Jago,* 676 F.2d at 1104. A jury may properly infer an aider and abettor's intent to kill where the facts show that the participants in a felony entered into a common design and the aider and abettor knew either that an inherently dangerous instrumentality was to be employed to accomplish the felony or that the felony and the manner of its accomplishment would be reasonably likely to produce death. *Scott,* 61 Ohio St. 2d at 165; *see also Lockett,* 49 Ohio St. 2d at 59-60. Therefore, the State in the instant case could attempt to prove O'Neal's intent to kill either by producing direct evidence of intent or by producing evidence to support a *Lockett/Scott* inference.

A jury instruction on intent to kill, based on the state of mind of "defendant and/or his accomplice," relieves the prosecution of its burden of proving an aider and abettor's independent intent to kill as required under Ohio law. In that circumstance, the instruction can be interpreted by a reasonable juror to mean that the defendant personally did not have to have the intent to kill in order to be convicted. The jury may believe that the accomplice's intent is sufficient to convict the

defendant for aggravated murder. *Clark v. Jago,* 676 F.2d at 1105; *Bell v. Morris,* 923 F.2d 854 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied,* 111 S. Ct. 2262 (1991). Here, the trial court did not go so far as to specifically state that O'Neal's intent to commit the crimes charged could be inferred from the state of mind of any other defendant, co-conspirator or accomplice. However, in instructing the jury on the elements of the offenses, the court discussed intent generally in terms of the state of mind of the "defendants, co-conspirators, or aiders and abettors" without reference to the intent required of each defendant individually. (*See* App. A, pp. 2, 3, 5-6, 7-8). These instructions were confusing, because they failed to set forth the requirement that each defendant have the intent to commit the offenses charged in order to be found guilty. Without further explanation, a reasonable juror could have interpreted these instructions to mean that a finding of intent on the part of one co-conspirator would be sufficient to establish the intent of others participating in the alleged conspiracy.

These errors in the jury instructions constitute a due process violation unless the instructions as a whole explained the confusing language so that a reasonable juror could not have concluded that the intent of one co-conspirator could be imputed to others. *See Francis v. Franklin,* 471 U.S. at 315; *Clark v. Jago,* 676 F.2d at 1105-06.

When instructing on the intent element of the crime of aggravated murder, the court stated:

> Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: ... where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable [sic] or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender

of the homicide.

(App. A, p. 2). This instruction was repeated to the jury when it requested a "brief definition of aggravated murder" during its deliberations. (Tr. 6208). Although the instruction was stated in pro-prosecution terms of a finding of guilt, it appears to set forth one of the two appropriate methods of inferring an accomplice's or co-conspirator's intent to kill under *Lockett* and *Scott*.

The trial judge also instructed the jury to "separately consider the elements applicable to each one of the defendants as [if] he or she were separately tried" and to "consider your finding as to each defendant uninfluenced by your verdict as to the other defendant." (App. A, pp. 3, 16). Further, when giving its instructions on complicity and conspiracy, the court told the jury that the State had to prove beyond a reasonable doubt the existence of a conspiracy or complicity among the defendants and the other co-conspirators before it could render a guilty verdict on the main charges. (App. A, pp. 7, 12, 13-14, 15). *Contrast Bell v. Morris,* 923 F.2d 854, at *13-14 (6th Cir. Jan. 24, 1991) (unpublished, available on Westlaw), *cert. denied,* 111 S. Ct. 2262 (1991).

On the other hand, no instructions were given regarding the requisite intent of an accomplice or co-conspirator on the charges of aggravated robbery or kidnapping. Nor did the court ever explicitly instruct the jury, with respect to any of the three offenses charged, that the State had to prove an accomplice's or co-conspirator's independent intent to commit the crimes. When instructing on the elements of complicity, the court stated: "[W]here two or more persons have a common purpose to commit a crime and wherein a continuing sequence over [sic] events other crimes are committed, all of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed." (App. A, pp. 11-12). Given that the court repeatedly lumped "defendants, co-conspirators, and aiders and abettors" together throughout its instructions, without clarifying that an independent purpose to commit the crimes was necessary for a conviction, this instruction could have been interpreted by a reasonable juror to mean that an accomplice could

be convicted for crimes only the principal offender intended to commit during the sequence of events.

The risk that the jury could have wrongly interpreted the instructions on intent was substantially increased by the prosecutor's closing remarks:

> MR. MARINO: Now, I fear that defense counsel gave you the impression that each defendant must commit every element of the crime to be liable (sic). That's incorrect."

(Tr. 6075). The judge overruled an objection to this statement, thus appearing to endorse it. *Id.* The prosecutor continued:

> MR. MARINO: In the state of Ohio and in most states in my opinion we have what's called conspiracy and the judge is going to tell you about that. The State is bound to prove to a jury two things. First, that the crimes alleged have been committed. And at this point, is there any doubt in your mind that the man was kidnapped, he was robbed, he was bludgeoned and shot to death. The next thing we're bound to prove to you is that those accused of the crime participated in a criminal conduct and engaged in a course of criminal conduct which eventually led to the commission of those crimes.
>
> MR. MILANO: Objection. It is a misstatement of the law, sir.
>
> THE COURT: Overruled.
>
> MR. MARINO: Folks, if that's a misstatement of the law, you are the second jury to hear it (referring to the trial of the codefendants).

MR. COUGHLIN: Objection, your Honor.

THE COURT: Overruled. I would indicate the first case will not be mentioned in this closing argument.

(Tr. 6075-76). By making the aforementioned rulings, the trial judge endorsed the prosecutor's misstatement of law and confirmed to the jury that a similar instruction had been given in the trial of the codefendants. The prosecutor's remarks were likely to have been accepted by the jury as the law, because they came from a state official charged with prosecuting criminal cases and were essentially endorsed by the trial judge. The jury was left with the impression that the State did not have to prove beyond a reasonable doubt an independent intent to commit each crime so long as it proved that each defendant was in some way involved in a conspiracy that eventually led to kidnapping, robbery, and murder.

In the context of the instructions as a whole, viewed in light of the prosecutor's remarks in his closing argument, which were endorsed by the trial court's refusal to sustain an objection, the remaining instructions were insufficient to dispel the possibility of confusion. A reasonable juror could have concluded that the intent of one co-conspirator could be imputed to other participants in the alleged conspiracy. Thus, these erroneous instructions constituted a violation of O'Neal's right to due process of law.

However, this does not end the inquiry. We must next determine whether this due process violation amounted to harmless error. *See Clark v. Jago,* 676 F.2d at 1105. Because this determination involves examination of the entire trial, we will make this analysis after review of other alleged errors. *See infra*, pp.41-49.

V. The Additional Alleged Trial Errors of Nonconstitutional Dimension Were Sufficiently Prejudicial to Implicate O'Neal's Fair Trial Rights

O'Neal argues that he was deprived of his fourteenth amendment Due Process right to a fundamentally fair trial because the trial court

erroneously admitted into evidence gruesome photographs of the murder victim, as well as other inflammatory physical evidence, and because the prosecutor committed acts of prejudicial misconduct during trial. (Doc. 31, pp. 30-36, 38-43).

The scope of federal habeas review of these claims is narrow. Where, as here, no specific constitutional guarantee is involved, these claims of ordinary trial error do not rise to a constitutional level unless the errors were so prejudicial as to deprive a defendant of a fair trial. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 642-43 (1974); *Martin v. Foltz,* 773 F.2d 711, 716 (6th Cir. 1985), *cert. denied,* 478 U.S. 1021 (1986). *See also Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988).

A. The Admission of Certain Evidence Prejudiced O'Neal

O'Neal challenges the admission into evidence of eighteen photographs of the murder victim taken at the coroner's office, showing the victim from different angles in various stages of undress, and eight close-ups of the victim's face. (*See* Tr. 3710-13). O'Neal also challenges the admission of nine photographs showing the victim in the field where he was discovered; the actual "smelly" clothing and wrappings in which the victim was discovered; a jar containing the skin from the victim's left finger; a box containing scalp hair from the victim; and a crowbar found in O'Neal's bar. (*See* Tr. 3631, 4754, 4766, 4791, 4814).

In his assignments of error to the Ohio Court of Appeals, O'Neal argued only that the admission of photographs was prejudicial. (Doc. 49, A-164, II). Ordinarily, this would mean that O'Neal waived any claim on federal habeas review regarding the admission of the allegedly inflammatory physical evidence absent a showing of "cause" for and "prejudice" from his failure to raise this claim to the state appeals court. *See Ewing v. McMackin,* 799 F.2d 1143, 1148 (6th Cir. 1986); *see also Murray v. Carrier,* 477 U.S. 478, 485 (1986). However, the Ohio Court of Appeals *sua sponte* addressed whether the admission of Podborny's clothing, the skin from Podborny's finger and the crowbar unfairly prejudiced O'Neal. The only evidentiary issue the Court of Appeals did not address was the admission of the scalp hair. O'Neal has not

presented any justification for his failure to raise that issue to the state appeals court, and this Court should therefore consider that claim waived. However, since the Ohio Court of Appeals addressed the remainder of O'Neal's claims regarding the introduction of inflammatory physical evidence, this Court should consider those issues on the merits.

In determining whether the admission of the evidence was prejudicial to O'Neal, this Court must accord a presumption of correctness to the state court's findings of fact that are fairly supported by the record. *See* 28 U.S.C. § 2254(d); *see also Sumner v. Mata,* 455 U.S. 591, 597-98 (1982). This presumption of correctness does not attach to the state court's conclusions of law, or to its application of law to the facts. *Pryor v. Rose,* 724 F.2d 525, 528 (6th Cir. 1984)(en banc).

The Ohio Court of Appeals ruled on O'Neal's claim as follows:

> [The coroner's] photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin, removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way [sic] the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by ... O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with this case.... We ... conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

(Doc. 10, Ex. C, pp.6-7).

Ohio R. Evid. 403(A) generally provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." The risk of unfair prejudice occurs when the evidence is so gruesome or is "charged with such immediacy or emotional impact" as to produce an inflammatory reaction by the jury against the defendant. *State v. Benner,* 40 Ohio St. 3d 301, 311 n.2, 533 N.E.2d 701 (1988), *cert. denied,* 110 S.Ct. 1834 (1990); *State v. Tingler,* 31 Ohio St. 2d 100, 285 N.E.2d 710, 713 (1972); *State v. Hill,* 12 Ohio St. 2d 88, 90, 232 N.E.2d 394 (1967). The mere fact that the evidence is gruesome or horrendous is not sufficient to render it per se inadmissible. *State v. DePew,* 38 Ohio St. 3d 275, 281, 528 N.E.2d 542 (1988), *cert. denied,* 489 U.S. 1042 (1989). Rather, the risk of prejudice created by the introduction of such evidence must be balanced against the need for the evidence to prove an issue at trial. *See Papp v. Jago,* 656 F.2d 221, 223 (6th Cir.), *cert. denied,* 454 U.S. 1035 (1981); *see also State v. Martin,* 19 Ohio St. 3d 122, 129, 483 N.E.2d 1157 (1985)(per curiam), *cert. denied,* 474 U.S. 1073 (1986), quoting *State v. Maurer,* 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984), *cert. denied,* 472 U.S. 1012 (1985).

Under Ohio law, an additional element is involved in the balancing process when gruesome photographs are introduced in a capital prosecution. Such evidence is admissible only if "the probative value does not, in a simple balancing of the relative values, outweigh the

danger of prejudice to the defendant" and the photographs are not repetitive or cumulative in nature. *State v. Morales,* 32 Ohio St. 3d 252, 513 N.E.2d 267, 273-74 (1987). The Ohio Supreme Court has noted that this standard, which is stricter than the usual standard for the admission of evidence, "is justified in capital cases because gruesome photographs which depict the victim of the offense are charged with such immediacy and emotional impact that the risk of prejudice is enhanced proportionately, a risk that we are less willing to tolerate in a case where the defendant faces a penalty of death." *State v. Benner,* 40 Ohio St. 3d at 311 n.2.

We have studied the eighteen photographs taken at the coroner's office (St. Exs. 1 through 1-Q). All of these photographs are gruesome. They graphically depict the deterioration to the victim's body and the injuries to the skull area, as well as the victim's distorted facial features, which were discolored by the wrappings encasing the body. The photographs of the victim's head (St. Exs. 1 through 1-G) are especially gruesome. *Cf. State v. Rowe,* 163 W. Va. 593, 259 S.E.2d 26, 28 (1979). They constitute relevant evidence of cause of death, intent to kill, and the fact that the victim had been dead for a long period of time. The remaining ten pictures of the victim's body, which were taken as the wrappings and clothing were removed, are of possible relevance to prove efforts made to hide the body. The coroner and other witnesses, however, provided uncontradicted testimony at trial on all of these issues. (Tr. 3707-15). Furthermore, the defense did not contest either the cause of death, the intentional killing, or the efforts to hide the body. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 1 through 1-Q constituted prejudicial error.

As to the nine photographs introduced at trial showing the location where the victim's body was discovered, respondent submitted only seven to this Court for review.[6] The record indicates that six of the photographs depicted the area where the body was discovered, showing

[6] Respondent admits that these photographs may not be the same photographs introduced in O'Neal's trial, but that they were the only photographs that could be found depicting the location of Podborny's body. (Doc. 67).

only the body encased in wrappings, and the remaining three photographs depicted the body at the discovery site as it was unwrapped. (Tr. 4491-92). We have carefully studied the seven photographs submitted, and we find they are consistent with the record description. These photographs constitute relevant evidence of the attempt to hide the body and the condition of the body when it was found. The six photographs depicting the area where the body was discovered and the body encased in wrappings (St. Exs. 58, 58A, 58B, 58C, 58D, 58F) are not inflammatory. *Cf. State v. DePew,* 38 Ohio St. 3d at 281. Moreover, one of the three photographs submitted depicting the body as it was unwrapped at the scene (St. Ex. 58E) is not gruesome, because body parts are not recognizable in it. The remaining two photographs, which are close-up views of the victim's upper body and face, are gruesome enough to create a risk of prejudice. (St. Exs. 58G, 58H). The coroner and other witnesses provided uncontradicted evidence to establish the same facts these photographs were offered to prove. The defense did not contest the facts that the body was hidden and had deteriorated. Thus, despite their relevancy, the risk of prejudice far outweighed the probative value, because there was no need to admit these photographs. Therefore, the admission of State's Exhibits 58-G and 58-H constituted prejudicial error.

The admission of the jar containing the skin from the victim's left finger was prejudicial to O'Neal. We agree with the Ohio Appeals Court's finding that the skin was relevant to fingerprint identification of the decomposed remains as Mr. Podborny. However, the fingerprint taken from the skin, which was used to establish identity, was already in evidence. Furthermore, the identity of the victim was not contested by the defense. (Tr. 5714). Thus, although it was proper to preserve the victim's skin in the event the defense questioned the fingerprint identification, there was no need to admit the body part into evidence. The introduction of a part of the victim's body was charged with such emotional impact that it could only have constituted an appeal to the jury's passion. The risk of prejudice far outweighed the probative value of the evidence because there was no need for this evidence. Therefore, the admission of the victim's skin constituted prejudicial error.

The admission of a "crowbar" found in O'Neal's saloon when Allen

was arrested there around 12:00 a.m. on March 26, 1981 was also prejudicial to O'Neal. (Tr. 4439-40). The Ohio Court of Appeals found it was not relevant because there was no evidence connecting the crowbar with the murder. The crowbar was tested for the presence of blood, and the test results were negative. (Tr. 3702). Thus, the admission of the crowbar constituted prejudicial error.

Finally, the admission of the victim's malodorous bloodstained clothes as well as the wrappings that encased the victim's body was prejudicial to O'Neal. The Ohio Appeals Court concluded that the evidence had probative value because it tended to show that the body had lain for a long time before it was discovered and that attempts had been made to hide the body. However, there was other substantial uncontested evidence in the record to establish these facts, including photographs of the identical clothing and wrappings. (Tr. 4752-53). Thus, there was no need at all for the admission of this evidence. The admission of the victim's clothing and wrappings was highly inflammatory because the evidence was charged with an emotional immediacy. For these reasons, the admission of the said evidence constituted prejudicial error.

The aforementioned prejudicial errors are sufficient to trigger further inquiry as to whether O'Neal was deprived of a fundamentally fair trial.

B. The Prosecutor's Misconduct Prejudiced O'Neal

1. The Prosecutor Improperly Questioned O'Neal About A Previous Killing

O'Neal contends that the prosecutor improperly cross-examined him by eliciting details of a previous incident in which O'Neal shot and killed another person. O'Neal argues that the cross-examination elicited impermissible "other acts" evidence in violation of Ohio R. Evid. 404(B) and in violation of a court order prohibiting reference to the incident.

O'Neal's assignment of error to the Ohio Appeals Court regarding

this issue claimed trial court error rather than prosecutorial misconduct. (Doc. 49, App. A-164, IV). The Ohio Court of Appeals, however, addressed the issue and made the following factual findings regarding this claim, which are entitled to the presumption of correctness. *See* 28 U.S.C. § 2254(d).

> [D]uring the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why [O'Neal's] gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why [O'Neal's] gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.
>
> [O'Neal's] gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination, in spite of its previous order, the court permitted the prosecutor to extensively cross-examine [O'Neal] about the details surrounding the manslaughter case....

(Doc. 10, Ex. C, p.4). This is a clear indication of prosecutorial misconduct. Furthermore, since we have already identified prejudicial trial errors, we are required to examine the entire trial for fairness. *See Arizona v. Fulminante*, 111 S. Ct. 1246, 1263-64 (1991).

On direct examination, O'Neal attempted to explain why he received $6,500 from Toney and what he did with it. He stated the money was originally intended to be Toney's investment in his business and was to be used to purchase a liquor license. However, the license cost more than that, so he held the money for other purposes. Subsequently, he was charged with a crime in East Cleveland, the nature of which he did not describe, and he used the $6,500 to pay

attorney fees in that case. The case was dismissed, and he was able to retrieve a .38 caliber revolver that had been confiscated in connection with the case. He emphasized that the revolver was registered, and stated it would not have been returned otherwise. (Tr. 4844-46). His attorney then asked the following question and received the following answer:

> Q: You certainly wouldn't go out and kill someone with your registered gun, would you?
>
> A: I wouldn't do that.

(Tr. 4846-47). During direct examination, O'Neal did not mention the facts of the East Cleveland case except to say that he was "charged with something." (Tr. 4845).

Co-defendant Allen's attorney then elicited further testimony from O'Neal on the East Cleveland incident without mentioning that a shooting had occurred. O'Neal testified that a shell was fired from his revolver when it was confiscated in East Cleveland and that authorities had a sample of the bullet. (Tr. 4874, 4876). O'Neal testified further that there had been no testimony that the the bullets from his revolver had been compared to the bullet in evidence. (Tr. 4876).

On cross-examination, over numerous objections by O'Neal's counsel, the prosecutor asked the following questions, clearly implying that because O'Neal had killed Calvin Heinz in East Cleveland by shooting him in the head, he had done the same thing to Mr. Podborny:

> Q. You shot that pellet into Calvin Heinz' head, the same way you shot Henry Podborny in the head?
>
> ****
>
> A. No, I didn't shoot Calvin's head like that.
>
> Q. But you did shoot Calvin Heinz in the head, didn't you?
>
> ****

> A. No, I didn't shoot him in the head, it was an accident.

(Tr. 4908). During this exchange, O'Neal's counsel objected to each question, but the judge did not rule on the objections. *Id.*

> Q. You shot him in the head; is that correct?
>
> A. I had 50 witnesses brought in to say that it was on the record that they saw him when he was trying to kill me.
>
> Q. The only witnesses were two lady friends?

Id. The Judge overruled an objection to these questions. *Id.*

> Q. You attempted to mislead the jury yesterday in attempting to lead the jury to believe that your gun was confiscated because of a gun violation?
>
> A. It was confiscated by the East Cleveland Police because of a gun registration violation and because of the accident in East Cleveland.
>
> Q. Was the registration violation first?
>
> A. Yes.
>
> Q. And secondary importance to the East Cleveland police is the fact that Calvin Heinz was killed with a bullet fired in his head?

(Tr. 4910-11). The judge overruled an objection to this question. *Id.*

> A. Yes, it was, sir.
>
> Q. Did you tell the police that Calvin drew on you first and you shot him in the head?

[O'Neal's Attorney]: Objection, your Honor.

A. The witnesses saw that.

THE COURT: Sustained as to the other matter. I think you made a point and you go on to some other matter. Strike that. Go on to some other matter. I think you made a point out of this.

(Tr. 4911). Nevertheless, the prosecutor continued to compare the Heinz killing to the Podborny killing. (Tr. 4911-15). He asked O'Neal to acknowledge that the evidence had shown that Podborny was shot with a bullet "consistent with being fired from a Smith & Wesson .38 caliber." (Tr. 4912). The judge overruled an objection to this question. *Id.* The prosecutor continued:

Q. The gun that you used to shoot Calvin Heinz was a .38 caliber Smith & Wesson pistol?

A. I didn't use it to shoot Calvin Heinz.

Q. Did the bullet come out of the barrel by itself?

A. That's the gun I used.

Q. Do you know of any other way of firing a bullet from a revolver other than pulling the trigger?

A. I didn't pull the trigger, it was an accident. I hit the gun.

Q. You shot him in the head?

A. I hit him in the head. He was trying to shoot me.

Id. The prosecutor next attempted to have O'Neal compare the bullet

identified as coming from Podborny's body to the bullet in the East Cleveland case. He had O'Neal examine the bullet in evidence and acknowledge that testimony had established that "this is the pellet that killed Hank Podborny." (Tr. 4914). He continued:

Q. And the one that killed Calvin Heinz is like that is it not?

A. I don't know, sir.

Id. The prosecutor continued:

Q. Sir, if we had the pellet from Calvin Heinz we could have been able to compare the pellet from Calvin Heinz with the pellet from Mr. Podborny, couldn't we?

(Tr. 4915). The judge overruled an objection to this statement.

The prosecutor also called a rebuttal witness at the close of trial. The witness testified that O'Neal was arrested in the East Cleveland matter and told the arresting officer, "That guy pulled a gun on me so I shot him." (Tr. 5696).

Ohio R. Evid. 404(B) excludes the admission of evidence of "other crimes, wrongs, or acts" to prove the character of the accused in order to show that the accused acted in conformity with his character on the occasion of the crime charged. *State v. Sims,* 3 Ohio App. 3d 321, 445 N.E.2d 235, 238 (1981). The evidence is considered irrelevant because, among other things, it creates an "overstrong tendency" to believe the accused guilty of the charge merely because he is a person likely to do such acts as well as the tendency to condemn because the accused has escaped punishment from other offenses. *State v. Curry,* 43 Ohio St. 2d 66, 68, 330 N.E.2d 720 (1975). The introduction of such evidence is prejudicial because it may completely overthrow the presumption of innocence. *See Pierce v. United States,* 86 F.2d 949, 952-53 (6th Cir. 1936).

There are certain exceptions to this general rule. Proof of other bad acts is admissible to show motive or intent, the absence of mistake or accident, or a plan or system of doing an act. Ohio Rev. Code Ann. § 2945.59 (Anderson 1987); *see also State v. Curry,* 43 Ohio St. 2d at 69. Also, where a defendant in a criminal trial testifies as to his past good behavior and character, the State is permitted to impeach such testimony with evidence of past criminal conduct. *See State v. Hale,* 21 Ohio App. 2d 207, 256 N.E.2d 239, 244-45 (1969), citing *State v. Marinski,* 139 Ohio St. 559, 41 N.E.2d 387 (1942). In such a case, the extent of the examination into the character or reputation of the accused shall be no more than necessary to counter the evidence of good character presented by the accused. *Id.* at 245.

Moreover, the State has a limited right to challenge the credibility of a criminal defendant by evidence of prior offenses when the defendant takes the witness stand and gives testimony in his own defense. *See State v. Tharp,* 49 Ohio App. 2d 291, 297, 361 N.E.2d 469 (1976); *State v. Patterson,* 43 Ohio App. 2d 63, 71, 332 N.E.2d 770 (1974). Questions as to prior convictions under state or federal law or questions eliciting defendant's admission of committing a prior criminal act are proper for testing the defendant's credibility. *State v. Tharp,* 49 Ohio App. 2d at 295-96. Questions as to prior arrests, indictments or accusations are improper for testing credibility "since arrests, accusations and indictments are not appropriate evidence of the actual commission of a crime which would affect credibility." *Id.* at 295, citing *Wagner v. State,* 115 Ohio St. 136, 152 N.E. 28 (1926); *see also Jones v. Haskins,* 343 F. Supp. 645, 652-53 (S.D. Ohio 1971), *aff'd,* 459 F.2d 479 (6th Cir.), *cert. denied,* 409 U.S. 990 (1972). In situations where the accused denies having committed a prior criminal act and the State offers no impeaching testimony on that issue, questions as to whether the accused committed a prior criminal act are also improper "since there is nothing to, in fact, establish the commission of a prior offense" and credibility is thus left unchallenged. *State v. Tharp,* 49 Ohio App. 2d at 295.

The limitations placed on cross-examination to test a defendant's credibility rest in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed in the absence of a clear showing

that such discretion was abused. *Id.* In the cases where Ohio courts have found no abuse of discretion in admitting such testimony, the trial courts had issued cautionary instructions at the time the evidence was introduced as well as at the close of trial, limiting the receipt of the evidence to the issue of credibility only. *See, e.g., id.* at 298-99; *State v. Patterson,* 43 Ohio App. 2d at 71. The Ohio Court of Appeals has cautioned that the State embarks on the course of introducing prior bad acts "at its peril," and that "the moment the impeachment process by evidence of prior or subsequent offenses passes the fine line separating the issue of credibility of the witness from the issue of the guilt of the defendant, prejudicial error intervenes." *State v. Patterson,* 43 Ohio App. 2d at 72.

In the instant case, O'Neal's attorney initially attempted to limit O'Neal's direct testimony regarding the East Cleveland matter to establish that O'Neal paid the $6,500 he received from Toney in legal fees and to show that his weapon was registered. However, he then foolishly went on to elicit testimony that O'Neal would not kill someone with a registered weapon. This opened the door for possible cross-examination on this issue.

The door having been opened, the prosecutor burst through it with a salvo of improper questions. He established that the East Cleveland matter was a case in which O'Neal had been accused of shooting Calvin Heinz in the head, and suggested this was the same manner in which he shot Podborny. He then coaxed an admission from O'Neal that it was indeed he who had shot Heinz in the presence of numerous witnesses. He also called a rebuttal witness to establish that O'Neal had admitted shooting Heinz. Finally, he attempted to compensate for the lack of scientific evidence showing the fatal bullet came from O'Neal's revolver by having O'Neal compare the bullet in the instant case to the one in the East Cleveland case.

During the course of this colloquy, the judge continuously overruled objections by O'Neal's counsel. He eventually sustained an objection, but only on the basis that the prosecutor had already made his point. The judge neither considered the relevance of this evidence nor balanced the risk of prejudice in receiving this evidence against its

relevance and need. At no time did the judge issue a cautionary instruction or an instruction limiting the questioning to the issue of O'Neal's credibility. Only one such instruction was given, much too late, during the charge to the jury at the close of trial.

Assuming, *arguendo*, that O'Neal's counsel opened the door to the prosecutor's questions about the Heinz shooting, the prosecutor went too far. He suggested to the jury that O'Neal shot Heinz the "same way [he] shot Henry Podborny in the head" and that the Heinz shooting was more than an accident or act of self-defense. This questioning was improper, particularly since the facts of the Heinz shooting had never been determined by a jury. *See State v. Tharp*, 49 Ohio App. 2d at 295. While this evidence had minimal relevance to the case at hand, it created a strong risk that the jury would use the evidence of the prior shooting for the improper purpose of finding O'Neal had the propensity to kill Podborny because he had killed another man or would convict him of the instant charges because he had escaped punishment for the prior shooting. *See State v. Curry*, 43 Ohio St. 2d at 68; *cf. United States v. Bakke*, 942 F.2d 977, 981-82 (6th Cir. 1991).

The prosecutor's improper cross examination, therefore, was sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

2. The Prosecutor's Inflammatory Argument Prejudiced O'Neal

We consider the improper argument for two reasons. First, because there is a due process fair trial issue, we must examine the entire trial process for fairness. *Lundy v. Campbell*, 888 F.2d 467, 472 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2212 (1990). Second, the improper arguments are an extension of the improper introduction of inflammatory evidence and the improper cross-examination of O'Neal; thus, they are part and parcel of the issues O'Neal raises.

In their opening and closing arguments, the prosecutors referred to the Heinz killing two times. These references crossed the line separating the issue of credibility from the issue of guilt. *See State v.*

Patterson, 43 Ohio App. 2d at 72. On the first occasion, the prosecutor said that O'Neal's "little problem in East Cleveland" was "in all actuality ... the killing of another human being." (Tr. 5809). On the second occasion, prosecutor Marino stated:

> [O'Neal] not only lied about being crazy about killing a man with a registered gun, counsel misled you, he further lied about how it occurred. "I hit him on the head and the gun went off." You show me one gun that is fired by hitting someone with the gun. You have to pull the trigger. He is going to complain it is a defective gun. Where is that gun?
>
> ****
>
> Which of you could shoot me first if I pulled a gun on you?... I also wonder about those situations. A guy pulled a gun on me so I shot him. Great.

(Tr. 6087-88). The judge overruled an objection to this argument. The latter statements improperly refer to facts not in evidence. No evidence was introduced on the subject of whether a gun can be fired by hitting a person with it, and no evidence was presented on whether a person could shoot another who had "pulled" a weapon first. The statements carry a great degree of credibility, coming from a state official charged with prosecuting criminal offenses. The jury was likely to accept these remarks as though they were credible testimony. These arguments could only have been intended to support the highly improper suggestion Marino made during O'Neal's cross-examination that O'Neal had intentionally murdered Heinz and thus must have murdered Podborny. The impact of this suggestion was magnified, because it came in the form of an opinion of a state official charged with the duty of investigating and trying criminal cases.

The prosecutor engaged in further misconduct during his closing argument by using the gruesome evidence of the victim's clothing and wrappings to appeal to the jury's passion:

> You are going to have [Mr. Podborny's] clothes back there. Grab those things, they stink, they've got blood on them. Wrap yourself in that blanket and see what the victim of a murder is like.
>
> ****
>
> Put a sheet over you, put the plastic over you. I tell you this now because this is what the case is all about.
>
> ****
>
> As I said, I asked you to do this, to get into the case, to really handle the case. You can always wash up later, folks.

(Tr. 6121-23). The prosecutor's improper reference to the crowbar in closing argument was also inflammatory. He advised the jury to "pick that crowbar up, you get dirt on your hands, you tell me about it." (Tr. 6120-21).

Had the jury followed this argument literally, one can picture the twelve jurors seated around a conference table in the jury room, each wearing an item of the bloodstained clothing the victim was found in, each in turn lifting the crowbar, while viewing the gruesome photographs of the corpse. In this manner, they would deliberate O'Neal's fate. Such appeals to the juror's passions are unconscionable. They diverted the juror's attention from their task of examining and weighing the evidence objectively, and urged them to convict O'Neal for reasons legally irrelevant to his guilt or innocence. *See United States v. Solivan,* 937 F.2d 1146 (6th Cir. 1991). *Cf. State v. Thompson,* 33 Ohio St. 3d 1, 514 N.E.2d 407, 420-21 (1987). Upon studying the closing argument, it becomes clear that the prosecutor introduced the gruesome evidence for the express purpose of enabling him to make an inflammatory argument at the conclusion of the case.

The prosecutors' improper arguments, therefore, were sufficiently prejudicial to trigger further inquiry whether such conduct deprived O'Neal of a fundamentally fair trial.

VI. The Improper Jury Instructions, Combined With The Prejudicial Trial Errors, Deprived O'Neal Of His Right To a Fair Trial

Although the admission of inflammatory evidence and the prosecutor's conduct at trial was prejudicial to O'Neal, his conviction will be upheld unless the errors, taken as a whole, rendered the trial fundamentally unfair. *See Lundy*, 888 F.2d at 472. Respondent has the burden of proving that the erroneous jury instructions constituted harmless error. *Clark v. Jago*, 676 F.2d at 1105. On the other hand, O'Neal has the burden of establishing that the nonconstitutional trial errors and prosecutorial misconduct amounted to constitutional error. *See United States ex rel. Miller v. Greer,* 789 F.2d 438, 443-44 (7th Cir. 1986)(en banc), *rev'd on other grounds sub nom. Greer v. Miller,* 483 U.S. 756 (1987). *Cf. United States v. Lane,* 474 U.S. 438, 460-61 (1986)(Brennan, J., concurring). He must demonstrate that the errors "tilted the scales in favor of a guilty verdict." *See Webster v. Rees,* 729 F.2d 1078, 1081 (6th Cir. 1984); *see also Walker v. Engle,* 703 F.2d 959, 968 (6th Cir.), *cert. denied,* 464 U.S. 951, 962 (1983). Nevertheless, the erroneous jury instructions may be considered together with the nonconstitutional trial errors to determine whether O'Neal was accorded a fair trial.

We agree with the following statement by Judge Ryan on behalf of the United States Court of Appeals for the Sixth Circuit regarding the elements of a fair trial claim:

> Tomes have been written about the meaning of due process under the fourteenth amendment. But we have searched in vain for any useful, authoritative statement by the Supreme Court, or by the countless other writers who have addressed the subject, defining the elements, the criteria, the immutable components of a fair trial within the meaning of the due process clause of the fourteenth amendment. The accumulated precedent and scholarship on the subject instructs us that procedural due process is, in the last analysis, simply the court's notion of "fundamental fairness," *Rochin v. California*, 342 U.S. 165, 172 (1952), and

compliance with the principles "implicit in the concept of ordered liberty."

Lundy, 888 F.2d at 470.

The latest pronouncement on this subject by the Supreme Court indicates that trial errors and "most constitutional errors can be harmless." *Arizona v. Fulminante*, 111 S.Ct. 1246, 1263 (1991). Such errors, which occur during the presentation of the case to the jury, may be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 1264. Other constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* The majority in *Fulminante* considered the latter to be "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 1265. Following *Fulminante*, we must determine whether the prejudicial actions outlined above were "structural defects" in O'Neal's trial or whether they must be analyzed under a harmless error standard.

We seriously doubt that O'Neal could have received a fair trial in the emotional atmosphere created by the introduction of unneccessary and gruesome evidence; the evidence of a prior killing committed by O'Neal where the victim was shot in the head; the prosecutor's inflammatory argument designed to stir the passions of the jurors; and the effective endorsement of such actions by the trial judge through his overruling defense objections, failing to weigh the prejudice of such evidence, and failing to give prompt cautionary instructions.

Relevant factors to consider regarding prosecutorial misconduct are: 1) the degree to which the improper remarks have a tendency to mislead the jury and to prejudice the defendant, 2) whether they were isolated or extensive, and 3) whether they were deliberately or accidentally placed before the jury. *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc), quoting *United States v. Leon*, 534 F.2d 667, 678 (6th Cir. 1976).

The admission of twenty gruesome photographs of the victim and

the other inflammatory physical evidence, coupled with the prosecutor's improper arguments regarding such evidence, were designed to influence the jury to convict O'Neal out of sympathy for the victim and passion concerning the nature of the killing as well as to punish O'Neal for the vileness of the deed, rather than on the basis of the evidence. Moreover, the prosecutor's excessive questioning regarding the details of the Heinz killing, coupled with his improper argument concerning that evidence, could have influenced the jury to convict O'Neal solely to punish him for killing another man, thus adding to the possibility that O'Neal was convicted for reasons that had nothing to do with the objective evidence presented regarding Podborny's kidnapping and murder. The prosecutor's prejudicial questions and remarks were extensive rather than isolated. The trial judge's effective endorsement of these actions encouraged the jury to give them their full prejudicial effect.

The obvious purpose and the likely result of such inflammatory evidence and improper arguments was to cause the jury to abandon its impartiality in weighing the evidence. Added to that are the confusing jury instructions and the improper prosecution argument concerning them, which could have led a reasonable juror to conclude that O'Neal could be convicted of each crime absent specific intent, so long as his accomplices had the necessary specific intent. Furthermore, although the Supreme Court has forclosed this issue as an independent ground for constitutional error, it is important to note that O'Neal was intentionally deprived of the presence of any juror of his race to deliberate his fate.

Following the mechanical approach in *Fulminante* of dividing fair trial issues into two exclusive categories, we believe the circumstances outlined above created a "structural defect" in the trial. To paraphrase the Court in *Fulminante*, in the absence of an impartial jury, " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " 111 S.Ct. at 1265, quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

On the other hand, the Supreme Court's admonition that trial

errors and most constitutional errors can be harmless, 111 S.Ct. at 1263, indicates it would be wise to make a harmless error analysis.

Under the harmless error analysis, if review of the entire record reveals that the evidence of guilt is overwhelming, even a substantial error will not transform an otherwise fair trial into an unfair trial because it is likely that the error had little, if anything, to do with the jury's verdict. *See, e.g., Kirby v. Dutton,* 831 F.2d 1280, 1283-84 (6th Cir. 1987); *Webster v. Rees,* 729 F.2d at 1081; *Cook v. Bordenkircher,* 602 F.2d 117, 121 (6th Cir.), *cert. denied,* 444 U.S. 936 (1979). *See also Lundy v. Campbell,* 888 F.2d at 481. The "entire record" refers to all that occurred from the empanelment of the jury to the return of the verdict. *Id.* It includes, among other things, the quality and quantity of the evidence of the defendant's guilt; the extent to which the evidence of guilt was consistent or inconsistent, contradicted or uncontradicted, and clear or vague; the manner in which the evidence was presented; the interest or bias of the witnesses; whether witnesses' testimony was impeached; the extent of defense counsel's objections to the practices now assailed as unfair; and everything the jury saw and heard, such as legal arguments, objections, evidentiary rulings and the court's instructions to the jury. *Id.* at 472-73. Although reviewing courts cannot know the actual impact the errors had on a jury, they must strive to "evaluate the likely effects . . . , based on reason, principle, and common human experience." *Estelle v. Williams,* 425 U.S. 501, 504 (1976); *see also Holbrook v. Flynn,* 475 U.S. 560, 567-68 (1986); *Illinois v. Allen,* 397 U.S. 337, 344 (1970).

At trial, the State introduced the following evidence of O'Neal's guilt.

Toney testified that O'Neal was present at his saloon on January 29, 1981, when she left Mr. Podborny there, according to a prearranged plan. (Tr. 1855-58). She said she waited for several minutes, at which time O'Neal came out and brought her Podborny's keys, wallet and travelers' checks. (Tr. 1859). Toney testified that Allen came from the saloon, entered the back seat of her car, and said he had hit Mr. Podborny on the legs with a pipe so he could not run. (Tr. 1862). A police officer testified that Allen and O'Neal admitted that Mr. Podborny was

brought to O'Neal's place; that he was forcibly restrained at that time; that O'Neal gave Mr. Podborny's personal effects to Toney, who was waiting outside; and that Allen later came out saying he had hit Podborny with a pipe in the legs. (Tr. 4446, 4464-65). They claimed that an unknown black male was involved in apprehending Mr. Podborny. Allen stated that he did not actually strike Mr. Podborny in the legs, even though he acknowledged to Toney that he had, and that when he returned to O'Neal's bar later that evening, Mr. Podborny was gone. (Tr. 4447, 4460).

Physical evidence admitted at trial tended to show that Podborny was killed in O'Neal's bar. Blood was found on a mirror square, panels, and ceiling tile in the bar. Scientific test results showed that the blood from the panels matched the blood found on the victim's shirt. (Tr. 3684). There was testimony that no more than six percent of the population has that blood type. (Tr. 3685-86). Other tests demonstrated that the manner in which the blood spattered was consistent with Mr. Podborny's height. (Tr. 3693). There was further testimony that paint found on the victim's body was similar to paint from O'Neal's bar in color tint and porosity, although no conclusive match could be made. (Tr. 3653). Finally, O'Neal's counsel conceded in closing argument that Podborny was killed in O'Neal's saloon. (*See* Tr. 5841).

Tape recordings of phone conversations between Toney and Allen, which occurred on March 25, 1981, after Toney had been apprehended and before Allen's arrest, were introduced. In the first conversation, Toney asked Allen to tell O'Neal that "we have got a doctor up here that's going to certify Hank and commit him . . . so it's important that I get him ... alive." (Tr. 4983). Instead of denying knowledge about Mr. Podborny or his whereabouts, Allen responded by asking, "You need him there?" *Id.* When Toney told Allen that Mrs. Podborny would get everything once Podborny was committed, Allen asked, "It's going to be Dimple's?" (Tr. 4984). Toney responded, "Right. But Hank has to show up, you know." *Id.* At that point, Allen again asked, "You mean you need him there?" When Toney answered in the affirmative, he said, "Okay. I'll get right to him." *Id.*

In another taped conversation with Toney, Allen asked, "You ain't

said nothing about nothing to that doctor, have you?" (Tr. 5006). When Toney told Allen "no," the conversation continued:

> Allen: [D]on't say nothing to him about that.
>
> Toney: What do you mean?
>
> Allen: Uh, about anything. You know, about, you know, that package.
>
> ****
>
> Toney: Dimple already told the doctor some things and got it all set....
>
> Allen: Oh no....
>
> ****
>
> Toney: Is he in pretty good condition?
>
> Allen: Yeah.
>
> Toney: Okay. Because you know ....
>
> Allen: That package is in good condition.
>
> Toney: Okay. 'Cause if, you know, this doctor, we don't want another witness.
>
> ****
>
> Allen: Well, sure don't, that's why I said don't say nothing about the package.
>
> ****
>
> Toney: Is, uh, he on any kind of drugs? 'Cause that doctor can tell. That, you know, the package.
>
> Allen: Okay. Well, meanwhile until you hear from him, don't do nothing till [sic] you hear from

> him, okay?
>
> Toney: Uh, Lloyd, it's, it's more money than we ever thought of having.
>
> Allen: 'Cause it'll be best not to even say nothing until and see what he's going to say first. Okay?
>
> Toney: Well, but we'll lose the money if we, if we can't deliver.
>
> Allen: Uh, uh. I know it. But then you know how he is.

(Tr. 5007-12).

Wilbur Higgins testified that, when he visited O'Neal in jail on April 2, 1981, O'Neal said that he and Allen had killed a man and had placed his body in the field next to Higgins' home. (Tr. 3726-27). Higgins testified that O'Neal asked him to go out in the field and cover the body, saying that his life was in Higgins' hands. (Tr. 3726). Higgins said he never went to the field because he did not want to become involved and he notified a city inspector of the body's location two weeks later. (Tr. 3728). Higgins also said that, one night during the winter of 1981, he saw O'Neal and Allen with a car parked at the back of his building. (Tr. 3730). O'Neal told Higgins that he and Allen "had two womans [sic] back there in the car," and asked Higgins "to leave for a while. (Tr. 3730-31). Higgins did not see any women and left. *Id.* The car was parked approximately ten to twelve feet from where Mr. Podborny's body was later found. (Tr. 3733).

Although the evidence against O'Neal was substantial, it was not overwhelming. The testimony of Toney and McLean must be viewed with caution because they were admitted accomplices. *See* Ohio Rev. Code §§ 2923.01(H)(2) and 2923.03(D). Toney's testimony was contradicted by McLean, who provided a radically different version of the events related to him by Toney. The State presented no evidence regarding O'Neal's continuing presence in the saloon where the victim was apparently murdered. O'Neal testified that he had a separate

residence and other business investments. Thus, the possibility existed that Podborny could have been murdered in O'Neal's saloon without O'Neal's knowledge. O'Neal denied his alleged oral statement to police, and no written statement existed.

O'Neal's theory at trial was that Toney and Gabbard kidnapped Podborny and murdered him in O'Neal's saloon without O'Neal's knowledge. (Tr. 5840-43). Both Allen and O'Neal testified and denied involvement in the robbery, kidnapping or murder. (Tr. 4868, 4873, 4961). O'Neal denied seeing any blood in his saloon and said he did not know how the blood got there. (Tr. 4898). O'Neal and Allen both testified that Toney had a set of keys to O'Neal's bar. (Tr. 4900, 4902). Allen testified that he was beaten to coerce him to make and sign a statement corroborating Toney's version of the events. (Tr. 4959). Allen also explained that he had trouble hearing Toney in her phone conversations with him and that his impression was that she was referring to O'Neal, "as far as putting him in a hospital for his hernia operation." (Tr. 4947-48).

Most importantly, Higgins' credibility was seriously undermined at trial. O'Neal denied that he told Higgins he and Allen had killed Podborny and that he asked Higgins to cover the body. (Tr. 4860). On cross-examination by O'Neal's counsel, Higgins stated that he was arrested and held in jail for five hours before he told his story to the police. (Tr. 3758-59). Although Higgins said he decided to talk to the police out of his "own free will" and they did not put words in his mouth, he admitted telling defense counsel in an interview at his home that he signed a statement for the police because they threatened he would be charged with murder if he did not do so. (Tr. 3761, 3776, 3783, 3789).

The above analysis demonstrates that the jury had substantial credibility issues to resolve. The improper instructions on state of mind could have led the jury to convict even if they believed O'Neal's version of events, on the basis that O'Neal had been involved in a conspiracy to obtain money from either Mrs. or Mr. Podborny that eventually led to kidnapping, robbery and murder. *See* discussion *supra*, pp. 18-24. The impartial atmosphere in which the jury should have resolved these issues was destroyed by the needless introduction of gruesome evidence,

the prosecutor's inflammatory argument regarding said evidence, the prosecutor's improperly establishing that O'Neal had previously killed a person by shooting him in the head with his revolver, and by the prosecutor's improper suggestion that the previous killing was credible evidence that O'Neal was guilty of Podborny's murder. Additionally, the prosecutor intentionally deprived O'Neal of jurors of his own race to help determine his guilt. We find it impossible to conclude that these factors "pale into relative insignificance" in the face of the record evidence of O'Neal's guilt. *See Lundy*, 888 F.2d at 481.

For all these reasons, we conclude O'Neal did not receive a fair trial.

VII. The Failure of the Ohio Court of Appeals to Address an Assignment of Error Deprived O'Neal of Due Process of Law

O'Neal claims that his rights under the fourteenth amendment were violated when the Ohio Court of Appeals failed to address his state law claim that the trial court erred in denying his motion for a separate trial. O'Neal raised that claim as an issue on appeal in his seventh assignment of error.

The first six assignments of error were filed in two separate briefs on July 15 and 26, 1982. (Doc. 10, Ex. D, p.9). On May 12, 1983, O'Neal filed a motion to file a supplemental brief instanter adding the seventh assignment of error. (Doc. 49, App. A-224). That motion was allowed on June 3, 1983. *Id.*, App. A-114. However, in its opinion affirming the trial court's judgment, the Appeals Court did not address the seventh assignment of error. (Doc. 10, Ex. C). Only Judge Stillman addressed the issue in his dissenting opinion. He concluded that the trial court's judgment should have been reversed on the ground that the individual defendants in the Podborny cases should have been tried separately from one another. *Id.*

On July 30, 1985, O'Neal filed a motion for reconsideration requesting the Appeals Court to address the seventh assignment of error. (Doc. 49, App. A-250). On September 4, 1985, the Appeals Court

denied the motion in a two-to-one decision without stating any reasons for the denial. *Id.*, App. A-115. After the Ohio Supreme Court dismissed O'Neal's appeal, O'Neal filed a complaint for writ of mandamus with the Ohio Supreme Court seeking an order requiring the Appeals Court to rule in writing on O'Neal's seventh assignment of error. *Id.*, App. A-217. On April 2, 1986, the Ohio Supreme Court denied the writ without opinion. *Id.*, App. A-278.

Ohio R. App. P. 12(A) provides that "[a]ll errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." As a matter of state law, failure to rule on an assignment of error presented on appeal constitutes reversible error, requiring remand to the Appeals Court for compliance with Rule 12(A). *State v. Jennings,* 69 Ohio St. 2d 389, 433 N.E.2d 157 (1982); *Lumbermen's Underwriting Alliance v. American Excelsior Corp.,* 33 Ohio St. 2d 37, 294 N.E.2d 224 (1973); *Rothfuss v. Hamilton Masonic Temple Co.,* 27 Ohio St. 2d 131, 271 N.E.2d 801 (1971).

The parties have not cited, nor could the Court find, any case addressing the specific issue presented here - whether the failure to rule on an assignment of error presented on appeal, as required by state law, constitutes a violation of the fourteenth amendment. In *Smith v. Lockhart,* 882 F.2d 331, 334-35 (8th Cir. 1989), *cert. denied,* 110 S.Ct. 739 (1990), the Eighth Circuit held that federal habeas relief was not available to a petitioner who claimed that he was denied due process when the trial court violated its procedural rules by denying his motion for post-conviction relief without a hearing and without making written findings. The court reasoned that there is no constitutional right to state post-conviction review of convictions and that petitioner had not alleged the violation of any constitutional standard which could apply to the state's post-conviction review process in general or to the facts of that case in particular. *Id.* This case is distinguishable from *Lockhart* in that O'Neal claims that he was denied due process based on the failure of the Appeals Court to address a claim on his first appeal as of right.

It is well-settled that the Constitution does not require states to grant appeals as of right to criminal defendants seeking review of alleged trial errors. *Evitts v. Lucey,* 469 U.S. 387, 393 (1985). However,

once a state does provide the right to appeal following a criminal conviction, the appeal process must comport with the fourteenth amendment's guarantees of due process and equal protection. *Id.* at 393, 403; *see also Douglas v. California,* 372 U.S. 353, 356-57 (1963); *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). Under the fourteenth amendment, the State must provide a free transcript of the trial to indigent criminal appellants if that is the only way to assure an adequate and effective appeal. *Evitts,* 469 U.S. at 393, citing *Griffin,* 3511 U.S. at 20. Moreover, a first appeal as of right is not adjudicated in accord with due process if the criminal appellant does not have the effective assistance of counsel or is not provided with an impartial and disinterested tribunal on appeal. *Id.* at 396; *Bradshaw v. McCotter,* 785 F.2d 1327, 1329, *modified on reh'g on other grounds,* 796 F.2d 100 (5th Cir. 1986). A delay in the determination of a direct appeal also may violate the fourteenth amendment guarantees of due process and equal protection. *See Burkett v. Cunningham,* 826 F.2d 1208, 1221 (8th Cir. 1987); *Mitchell v. Zimmerman,* 582 F. Supp. 186, 187 (E.D. Pa. 1984). In addition, the denial of a criminal appellant's request to proceed on appeal *in forma pauperis* may deprive the appellant of his constitutional right to equal protection. *Harris v. Rees,* 794 F.2d 1168, 1175-76 (6th Cir. 1986).

The purpose of a first appeal provided as of right by a state is to determine whether the individual defendant has been lawfully incarcerated and to ensure a correct adjudication of guilt or innocence. *See Evitts,* 469 U.S. at 402; *Griffin,* 351 U.S. at 18-19. By deciding that an appeal is so important that it must be available as a matter of right, the State itself recognizes that the appeal plays such a crucial role that it cannot be decided arbitrarily; nor can the State otherwise deny an appellant fair procedure. *Burkett,* 826 F.2d at 1221, citing *Evitts,* 469 U.S. at 404. Due process concerns are implicated when the State fails to assure a criminal defendant an adequate opportunity to present his claims and to obtain a final determination on the merits of the appeal. *Evitts,* 469 U.S. at 402, 405; *see also Burkett,* 826 F.2d at 1221;*Galloway v. Stephenson,* 510 F. Supp. 840, 842 (M.D.N.C. 1981). Equal protection concerns are implicated when the State treats a class of defendants differently for purposes of offering them a meaningful appeal. *Evitts,* 469 U.S. at 405.

In this case, the Appeals Court essentially deprived O'Neal of a fair opportunity to obtain an adjudication on the merits of his first appeal when it refused to address his seventh assignment of error in accordance with state appellate procedural rules. O'Neal was entitled to a ruling on the seventh assignment of error, particularly in light of the fact that one of the three appellate judges concluded that the seventh assignment of error merited reversal of O'Neal's conviction. By failing to rule on this arguably meritorious claim, the majority opinion undermined the very purpose of providing a first appeal of right - to assure that the defendant is lawfully incarcerated.

Respondent argued in its memorandum opposing jurisdiction to the Ohio Supreme Court that because the seventh assignment of error was filed in a third filing approximately one year after the initial filings of assignments of error, the Appeals Court either overlooked the claim or deliberately disregarded it as untimely filed. (Doc. 10, Ex. D, p.9). However, even if it was untimely filed, the Appeals Court allowed O'Neal's motion to file a supplemental brief instanter adding the assignment of error, thereby permitting the issue to become part of the record. The Appeals Court could not have overlooked the claim, because one of the judges ruled on it in dissent, and the court denied O'Neal's subsequent motion for reconsideration explicitly seeking a ruling on the seventh assignment of error. Rather, it appears the majority of judges intentionally ignored the claim.

Respondent further argues that O'Neal was not prejudiced by the failure of the Appeals Court to rule on the assignment of error because the issue was addressed by that court in each of O'Neal's co-defendants' cases. (Doc. 59, p.36). However, when a criminal defendant is deprived of his right to a complete and effective appeal, he need not demonstrate that he was prejudiced or that he has arguable grounds for a successful appeal. *Galloway*, 510 F. Supp. at 844, citing *Rodriquez v. United States*, 395 U.S. 327 (1969). "[W]hen the right to appeal itself is lost, the fairness of the proceeding is immediately impugned, without any further showing of harm being necessary." *Id.* at 844 n.4; *cf. Mitchell*, 582 F. Supp. at 188.

Accordingly, the failure of the Appeals Court to rule on O'Neal's seventh assignment of error violated O'Neal's right to due process of law under the fourteenth amendment. The remedy for this violation is a fair appellate review of the unaddressed claim, or, if no appellate review is afforded, issuance of a writ of habeas corpus. *See Reynolds v. Lockhart*, 497 F.2d 314, 316 (8th Cir. 1974); *see also Dowd v. Cook*, 340 U.S. 206, 210 (1951).

IT IS THEREFORE RECOMMENDED THAT:

1. O'Neal's petition for writ of habeas corpus be DENIED as to the following claims:

   (a) Claim that O'Neal should not have been tried with his co-defendants;

   (b) Claim challenging the racial composition of the jury.

2. O'Neal's petition for writ of habeas corpus be GRANTED unless respondent retries O'Neal within ninety (90) days of the date of this Court's final judgment, or within such further time as the Court may allow for good cause shown, based upon the following claims:

   (a) Claim of constitutionally defective jury instructions;

   (b) Claim that prosecutorial misconduct and erroneously admitted evidence deprived O'Neal of a fundamentally fair trial.

3. In the event the District Judge does not adopt recommendation 2 above, O'Neal's petition for writ of habeas corpus as to the claim of a denial of due process of law based on the Ohio Court of Appeals' failure to address an assignment of error should be GRANTED. Counsel for O'Neal should be ordered to file a motion to reinstate the appeal with the Eighth District Court of Appeals of Ohio

within 30 days of this Court's Order. In the event that the appeal is not reinstated within 60 days of the filing of O'Neal's motion, his petition for writ of habeas corpus should be granted and O'Neal should be released pending further proceedings. The respondent should be ordered to notify the Court in writing upon reinstatement of the appeal and to file a motion to dismiss this action. O'Neal should notify the Court in writing upon expiration of the 60 day period if the appeal is not reinstated.

Date: 1-22-92

Robert A. Steinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT O'NEAL,
Petitioner

vs Case No. C-1-86-0976

ARTHUR TATE JR.,
Respondent

APPENDIX A
TO REPORT AND RECOMMENDATION

The jury instructions given by the trial court on the offenses charged against O'Neal and his co-defendants, as well as on conspiracy and complicity, are attached in relevant part as follows:

Aggravated murder, therefore, is the killing of another purposely and with prior calculation and design. Before you can find the defendants Robert O'Neal, Lloyd Allen, Dimple Podborny guilty of aggravated murder, you must find beyond a reasonable doubt, ladies and gentleman, that first that Henry Podborny was a living person and that his death was caused by the defendants, or by a conspirator, co-conspirator or one aiding and abetting the defendants....

Secondly, that the killing was done purposely and, thirdly, that the killing was done with prior calculation and design, and, fourthly, that the act was an [sic] unlawful done willfully.

(Tr. 6158-59).

* * *

Purpose to kill is an element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the minds of the defendants or co-defendants or aiders and abettors, if you so find, a specific intention to kill the decedent Henry Podborny.

The Court in order to assist you in understanding the meaning of purpose or purposeful herein would give you this kind of special - will give you this instruction. Wherein the evidence may disclose the existence of complicity by way of an aider and abettor or a conspiracy, the law of the state of Ohio is as follows: As state in the leading case in the matter where you have an unlawful act contemplated in the original conspiracy, although not identical with or similar to the criminal act charged in the indictment, if the defendants conspired to commit an unlawful act, and the manner in which it was performed was reasonable or likely to produce the death of another, then each conspirator, or aider and abettor is equally guilty as the principal offender of the homicide.

Although such conspirator, or aider and abettor as a conspirator was neither present [n]or had knowledge of the physical killing, or the weapon used.

Now, a person acts purposely when the gist of the offense is a prohibition of conduct against a certain nature regardless of what the offender intended to accomplish. Therefore, if it is the specific intention and purpose to engage in an act of that nature, then the specific conduct or objective in producing a certain act results or engaged at the time specific conduct to do an act. Purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

(Tr. 6159-61).

* * *

Now, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life and to inflict great bodily harm, the

purpose to, intent to kill may be inferred from the use of the weapon.

(Tr. 6161).

* * *

Now, ladies and gentlemen, the Court will continue to define the various elements and I will define purpose again to robbery and kidnapping in a few moments. Being aggravated robbery and kidnapping, having the elements of purpose, now prior calculation and design is an essential element of the crime of aggravated murder.

Prior calculation and design means that the purpose to kill was reached by the defendants through a definite process of reasoning in advance of the killing, which process of reason must have included a little plan involving a study consideration of the method, the means or the instrument which kills another or a weapon used to kill another.

No definite period of time must have elapsed, or no particular amount of consideration must be given to the prior calculation and design to kill, but acting on the spur of the moment or after monetary consideration of the purpose to kill is not sufficient to constitute the crime of prior calculation and design -- strike that. Constitute the crime prior calculation, or the prior calculation and design needed to meet the element required for aggravated murder.

If you find from the evidence that the defendant or the co-conspirators, co-conspirator, either individually or co-conspirators, or aider and abettor were actually performing the act to kill and this purpose was arrived at with prior calculation and design before he or she performed the act, that is sufficient for this element of the crime of aggravated murder.

(Tr. 6162-63).

* * *

The Court would indicate at this time in this particular case we

have multiple defendants. We have three. And we discussed separating the question of guilt or innocence with each one of these defendants. You must separately consider the elements applicable to each one of the defendants as he or she were separately tried and you must separate it in your finding, as I will explain, to each defendant. You must state your finding to each count separately, also, and to each defendant uninfluenced by the verdict as it relates to the other defendants.

The counts, three separate counts, have to be considered separately. The defendants, each and every one of them, may be found guilty or not guilty as to any one or all of the charges set forth in the indictment.

(Tr. 6165).

* * *

"No person in attempting or committing a theft offense as defined in Section 2913.01 of the Ohio Revised Code, or in fleeing immediately after such offense, or offenses, shall do either of the following - - " And I have paraphrased this, either have a deadly weapon or dangerous ordinance as defined under 2923.11 on or about his person or under his control or in the alternative, inflict or attempt to inflict serious physical harm on another.

The elements briefly, from the definitions are that these defendants, or co-conspirators, or one which you find to be an aider and abettor, inflicts serious harm or attempts to inflict serious harm on another, or in the alternative that the defendant has a deadly weapon or dangerous ordnance on or about his person or under his control and that the defendant was either, in either case, was committing or attempting to commit a theft offense, or anything immediately thereafter of a felony, normally the Court would indicate that the defendants are charged with aggravated robbery.

And before you can find the defendants guilty, you must find beyond a reasonable doubt that on or about the 29th day of January, 1981, here in Cuyahoga County, that the defendants or an aider and

abettor or co-conspirator, did obtain or attempt to obtain property of some value, however small, for the purpose of depriving Henry Podborny of that property and the defendant had a deadly weapon or dangerous ordnance on or about his or her person or under her control. Or in the alternative, you will consider the alternative of serious physical harm, that is the defendants inflicted serious harm upon the person of Henry Podborny.

Now, those are the elements of aggravated robbery conspired in this case.

Now, purpose again is an essential element of the crime of aggravated robbery. Purpose to deprive the owner of his property and to obtain the property is an essential element of aggravated robbery. And once again a purposeful act, purposely is the specific intention to obtain certain results. And in this case it must be established at the time in question there was intent in the mind of the defendants and/or co-conspirators, or aiders and abettors in complicity, a specific contention to obtain the property of Henry Podborny.

Now to determine the purpose from which the person acts, does an act or brings about a specific result, is determined by the manner in which it is done, the means or weapon used and the weapon used and all other facts and circumstances in evidence. As to the issue -- as to the issue, rather, of a deadly weapon or dangerous ordnance, a deadly weapon, I have explained it one way. There is another way to explain it.

(Tr. 6165-68).

* * *

Deadly weapon is an object or instrument also of such size and weight and of such design and shape that it may be grasped in the hand in such a way that it may be used upon or directed against the body of another in a manner with such force to injure or kill the other -- another person.

(Tr. 6168-69).

* * *

In conclusion, the Court would indicate to you as it relates to count number two, aggravated robbery. If you find that the State of Ohio has proven each and every essential element of the crime of aggravated robbery as against the defendants, those who you find as co-conspirators, or aider and abettor, in that on January 29th, you found that they did unlawfully and purposely did in attempting to commit a theft offense as defined in 2913.01 and a theft offense, robbery is a theft offense, stealing is a theft offense.

In committing a theft offense, or in attempting to commit, fleeing thereafter, such offense upon Henry Podborny the defendants did have a deadly weapon or dangerous ordnance, to wit, a gun as alleged in the indictment, a gun on or about his person or under their control or if you find beyond a reasonable doubt in the alternative that on or about the 29th day of January, the defendants or co-conspirators or aiders and abettors or persons acting in concert with them unlawfully and purposely in attempting to commit a theft offense or in fleeing immediately after such attempt or offense upon Henry Podborny did inflict or attempt to inflict serious physical harm upon Henry Podborny then you should find the defendants guilty in the aggravated robbery, second count.

(Tr. 6170-71).

* * *

Now, the third count in this case involving kidnapping under 2905.01. And that statute reads as follows:

"No person by force, threat or deception or by any means shall remove another from the place where he is found, or restrain him of his liberty for any of the following purposes," and the purposes alleged in this statute that are alleged in the indictment are as follows: To facilitate the commission of any physical, any or, flight thereafter. That's under two of the statute.

Three, to terrorize or inflict serious harm on the victim or another. Therefore, you have these several elements as follows, it wit, one, that the defendant removes another, defendants, and when I say defendants I'm talking also about co-conspirators and aider and abettors, the defendants removed another from a place where he is found. And the defendants restrained another of his liberty and, two, that the means of removal or restraint is by either force, threat or deception. And, three, that the defendants purpose is to facilitate the commission of any felony or flight after the commission of a felony or in the alternative it is an either-or situation, again, is to terrorize the victim or to inflict serious physical harm to the victim.

That's the short form. I believe short-long all the way through here because that's the short form of what the State has to prove under the kidnapping statute before you can find the defendants herein, that is Gail Robert O'Neal, Lawrence O'Neal, Lloyd G. Allen, Dimple Podborny, guilty of kidnapping of Henry Podborny, you must find that beyond a reasonable doubt that on or about the 29th day of January, 1981, and in Cuyahoga County, Ohio, that the defendant, co-defendants, conspirators, rather aider and abettors, in complicity removed Henry Podborny from the place where he was found or restrained Henry Podborny of his liberty for the purpose of facilitating the commission of a felony or flight thereafter or in the alternative terrorize him or in the alternative to inflict serious physical harm on Henry Podborny and that such acts were accomplished by force, threat or deception.

That's if you find beyond a reasonable doubt in respect to Henry Podborny that he was removed from the place where he was found or restrained from liberty for the purpose of facilitating a felony or flight thereafter, or in the alternative to terrorize or separate, alternate to inflict serious harm to a defendant and that such removal was accomplished either by force, threat of force, deception then the defendants would be guilty of kidnapping under 2905.01.

On the other hand, if the State failed to prove any one of these essential elements of the crime of kidnapping, I repeat it, then you would find them not guilty.

(Tr. 6171-74).

* * *

Therefore, you have to determine these facts from the facts and circumstances in evidence. Whether or not the defendants or co-conspirators or aiders and abettors had the purpose in mind, either to commit a felony or facilitate the flight from the commission of a felony, or to otherwise have the purpose in mind to terrorize Henry Podborny, or otherwise had the purpose in mind to inflict serious harm on Henry Podborny, such as injury or death.

Now, in conclusion as it relates to kidnapping, if you find every essential element of kidnapping, that is the defendant, co-conspirators or person in concert or aider and abettors, did unlawfully and by force, threat or deception remove Henry Podborny from the place where he was found and restrained him of his liberty for the purpose of facilitating a felony, or flight thereafter, or in the alternative that they did for terrorizing or in the alternative for inflicting serious harm on Henry Podborny and failed to release him, the victim, in a safe place unharmed, then you must find the defendants guilty as charged in the indictment.

(Tr. 6176-77).

* * *

Now, ladies and gentlemen, I have indicated earlier that I would explain what is meant by conspiracy, aiding and abetting and complicity in this case. You will be called upon to decide from the evidence whether or not the State of Ohio has proven a conspiracy beyond a reasonable doubt among the defendants and the other co-conspirators. The Court would appoint out that the defendants have not been charged in this indictment under our conspiracy statute 2923.01, but have been charged in this particular case, the State of Ohio, theory of the case appears to be buttressed to their aiding and abetting or conspiracy. The central issue of concern is as follows, one, has the State proven an

agreement, a scheme or plan that was participated in by the defendants in this particular case, in a conspiracy intent, the element of the offense, conspiracy, is however more complex because it involved two elements of intent that shade with each other, each party, must have intended to enter into the agreement and scheme and they must have a common intent to commit an unlawful act.

Second issue, factual issue for you is whether or not the State has proven there was a concerted action by and between the defendants, or with other indicted or other unindicted co-conspirators. This you have to determine from the evidence.

Three, whether or not the defendants herein, either or all of them, or some or none of them, have aided or adjoined, aider or abettor, or joined in, in a conspiracy or existing conspiracy. To this extent the Court would indicate that the conspirator rule applies, if four conditions are established, one, that there is an attempt between the parties, two, that the particular defendants participation in the conspiracy, that is the defendants intended to commit and engage in criminal activity and, three, that the particular defendants participation was performed during the course of the conspiracy and, four, that the particular defendants participation was inference of the conspiracy, that is, there was a substantial overt act committed in furtherance of an illegal purpose.

Now, you should consider further whether or not the State has proven that each one of these defendants, that is Robert O'Neal, Lloyd B. Allen and Dimple Podborny, engaged in a conspiracy by committing an overt act in furtherance of an agreement between them, with the Court now defines and tells you what an overt substantially -- tells you about that.

What is a substantial overt act in furtherance of a conspiracy? An overt act is substantially when it is of such character as to manifest a purpose on the part of the actor, in this case, the defendants, that is any of these defendants, that the objective of the conspiracy should be completed. Conspiracy, ladies and gentlemen, is the plan or aiding in or planning with other, or agreeing with another person that one or more

of them will engage in a conduct with the purpose to commit or facilitate and/or promote the commission of a specific offense.

Therefore, a conspiracy is an undertaking or an agreement by one or more persons to carry out a common objective to commit, promote, or to facilitate a criminal act.

The existence of undertaking or agreement may be shown either by that direct evidence or by inferences from facts or circumstances in evidence, that is circumstantial evidence. Now the reason for the use of facts and circumstances and inferences, probably has been gathered from the facts that conspirators usually and generally are not open. And conspirators usually don't meet in one place and at one time.

There are various stages of a crime. There is a planning stage, there is a perpetrator who may require him before the crime to assist in planning it during the course of the crime until activity to aid in the commission of it, or in escaping from the scene, or after the defendants completed it or conceal or assist in evading answers, or protect or concealment of loot and the evidence against them.

Therefore, conspiracies are not really easily identifiable and hence the use of inferences and circumstantial evidence is allowed. Those who associate to perform the criminal act or know or share the objective and participate to some extent are bound by the acts of anyone, any one of their number, in carrying out the purpose of the conspiracy.

You may not consider the acts and statements of anyone against another unless the existence of the agreement and understanding to commit the criminal act is substantiated by the state beyond a reasonable doubt. The defendant cannot be convicted of a conspiracy unless substantial overact in the furtherance of the conspiracy is proved that -- pardon me. Is proved to have been done by he or she, or by a person with whom he or she conspired and that such act was performed subsequent to the defendant's entrance into the conspiracy.

An overt act is substantial when it is of such character to manifest the purpose on the part of the actor, that is, the defendant, that the object

of the conspiracy can be completed.

As to unidentified co-conspirators, or co-confidants, the Court would indicate that if the defendants know, or had reasonable cause to believe that a person with whom he or she converses, or has also conspired or was conspired with another person to commit the same offense, then that defendant is guilty of conspiring with such other person who's either co-conspirator or aider and abettor even though the identity of the other person was unknown to the defendants O'Neal and Allen and Podborny.

Ladies and gentlemen, a co-conspiracy terminates when the offense or offenses are committed, or when it is abandoned by all conspirators. A conspiracy remains in existence during such a period as the conspirators are concerned with the concealment of their criminal conduct as I have indicated earlier, as the testimony of the conspirator. The law of the State of Ohio is that no person shall be convicted on a conspirator's testimony unsupported by other evidence.

The Court will speak further on this matter at length.

The Court has mentioned the word complicity. Conspiracy and complicity are two separate and distinct legal theories.

Also complicity a person who aids or abets in conspiracy can be a co-conspirator, complicity in law means the conduct of one who purposely participates with another as a partner or accomplice for the purpose of committing a crime. The laws in Ohio on aiding and abetting or complicity is that a person who knowingly aids or assists another in the commission of a crime is just as guilty as if he personally performed every act constituting the crime.

I'm speaking of aiding and abetting now. When two or more principals have a common purpose to commit a crime and one does one part and the second performs the other part, those acting together are equally guilty of the crime.

Further, where two or more persons have a common purpose to

commit a crime and wherein a continuing sequence over events other crimes are committed, all of the persons are responsible for all of the crimes that happen in the continuous sequence of the events even though all of said persons were not physically present when the other crimes were committed.

This is the law in aiding and abetting or in complicity.

The mere fact that a person, as the same law, as aiding and abetting, the mere fact that a person is present when a criminal act is presented does not make him an aider and abettor unless he does some overt act in furtherance of the crime charged in the indictment.

Now, such persons under the law of complicity as distinguished from co-conspirators, such persons are regarded as if they were the principal offender and are just as guilty as if he or she performed each act constituting the offense. This is true even though they weren't physically present when the act was performed.

It is the law of Ohio when two or three persons have a common purpose to commit a crime and one does a part and second does another act, together those acting together with the purpose required for the commission of a crime, that is the purpose required for aggravated murder, aggravated robbery and kidnapping as it relates in this case, are equally guilty of the crime. And the Court instructs you as a matter of law in Ohio that an aider and abettor can be also found as to be a co-conspirator.

The Court has instructed you as to the offense of aggravated murder, aggravated robbery and kidnapping. Further -- period. Okay.

Further you will decide whether or not in this case the defendants assisted, or encouraged or directed or associated themselves with one another for the purpose of committing those offenses respectfully by, or consideration of the evidence.

Again, once again a person cannot be convicted -- rather, no person can be convicted of these offenses, aiding and abetting, solely on

the testimony of conspirators, solely on the testimony of accomplices unsupported by other evidence.

The Ohio Rules require even in conspiracy as well as the declarant that the defendants participation must be established upon independent proof of the conspiracy, such corroboration must come from evidence in the case aside from the testimony of her co-conspirators.

This consideration applies even with regard to the proof of the existence of the alleged conspiracy.

Corroborative evidence is evidence of some act or fact related to the offense, which if believed by itself and without any aid, interpretation or direction from the testimony of a co-conspirator then connects the defendant to the commission of the offense charged. It is not, however, necessary that the corroborative evidence be such in itself to establish every element of the offense charged now, and that it corroborate every fact to which a co-conspirator testifies.

Mere similarity of conduct among the various persons and the fact that they have been associated with each other and may have assembled together and discussed common aims and interest does not necessarily establish proof of the existence of the conspiracy. However, in this case the evidence in this case need not show that the member of the conspiracy entered into any express or formal agreement, or that they directly by words spoken, or in writing, stated between themselves with the objective or purpose was to be, or details thereof, or expressed means by which the means of the objective or purpose was to be accomplished.

What the evidence in this case must show though beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that the member of the conspiracy in some way or manner and through some contrivance positively, or tacitly, orally, written, expressly or impliedly, confederated, together, combined and agreed, that is, came to a mutual understanding to try to accomplish a common and unlawful crime.

The evidence in this case must establish beyond a reasonable doubt

that the alleged conspiracy was purposely formed and each defendant here and purposely joined and participated in the plan intended in advance and further some object or some conspiracy in which one may become a member of a conspiracy without full knowledge of the detail to have a conspiracy.

On the other hand, a person who has not knowledge of the conspiracy, but has to ac tin a way which further some object or purpose of the conspiracy, thus not thereby become a conspirator. To act or participate purposely means to act or participate voluntarily and intentionally in an unlawful enterprise and with the special intent to do something that the law forbids because of a certain unlawful result which was the subject of the agreement.

Thus, if any of the defendants purposely agreed to enter into a conspiracy, or joint venture to accomplish an unlawful objective, if you find that such defendants were co-conspirators or aider and abettors in complicity and in a substantial overt act in furtherance of an alleged conspiracy is proven beyond a reasonable doubt to have been done by this person, by him or her, and/or by a person or by a person with whom he conspires and that such act was performed subsequent to the entry of the defendant into the conspiracy, such defendant properly should be considered a co-conspirator.

An overt act is substantially, once again, when it is of such a character as to show a purpose on the part of the actor that the objective of the conspiracy should be completed. An overt act is any act purposely committed by one of the conspirators, or co-conspirators an effort to accomplish some objective or purpose of the conspirator -- conspiracy. An overt act need not be criminal in nature if conspired separately and apart from the conspiracy. It may be an act which taken alone by itself is innocent. It must, however, be an act which follows, intends towards the accomplishment of the plan or scheme. It must be purposely done in furtherance of some object or purpose of the conspiracy.

If it is established beyond a reasonable doubt that a conspiracy existed in this case, an act, a declaration, then the acts and declarations of any of the co-conspirators are chargeable against any -- are

chargeable against and may be considered with respect to each other co-conspirator with respect to each other co-conspirator as though the act of declaration was such -- was made by co-conspirator -- strike that -- the word I think I have -- Let's take that over.

If it is established beyond a reasonable doubt that a conspiracy existed, the act or declaration of a co-conspirator are chargeable against and may be considered with respect to each of the co-conspirators as though it was the act or declaration of such co-conspirators. Each co-conspirator act as an agent of the other.

The defendant cannot be bound by the acts or declarations of the other participant until it is established beyond a reasonable doubt that the conspiracy existed and that he was one of the members of the conspiracy.

Now, ladies and gentlemen, in conclusion the Court in summary would indicate that where two or more persons are associated in the same illegal purpose, any act or decision made by one of them with reference to the common objective and done, or said during the life of the conspiracy, may be given in evidence even where the indictment does not charge a conspiracy as such. A conspirator in effect is an agent for each of the other co-conspirators during the life of the conspiracy and as such any statements made or acts done by him in furtherance of the general plan and during the life of the conspiracy is admissible against the co-conspirator. And such declarations may also be testified by such person. And this is an exception to the so-called hearsay rule. It is not necessary that the conspirator be the one that commit the identical offense charged in the indictment or even a similar one. It is enough that the offense charged in the indictment was one that might have been contemplated as a result of the conspiracy.

And I made reference, when I started in the defining of purpose, I explained that during that course of defining purpose.

Finally, the Court would indicate that when an offender knows or has reason to believe, reasonable cause to believe to be with a person with whom he conspired and is also conspired with another to commit the

same offense, the offender is guilty of conspiring with such person even though that person's identity may be unknown to the offender.

Where two or more people enter into execution of a common criminal enterprise, what each does in the execution of the common purpose is the act of all, and if another crime is committed by one of them in attempting to accomplish the common criminal purpose, any one of them the aider and abettor in conspiracy with each other is guilty of the crime with the one who did the act if such crime was committed to accomplish common criminal purpose during the -- in furtherance during the time of the conspiracy. This is the law of Ohio.

These are matters, ladies and gentlemen, concerning aiding and abetting and conspiracy that you may consider and you may arrive at out of the evidence before you.

Now, before you can render a verdict of guilty on the main charges herein, that is aggravated murder, robbery -- aggravated robbery, and kidnapping, you must decide from the evidence beyond a reasonable doubt that the defendants either entered into a conspiracy as defined to you at length here, or in the alternative found to be aiders or abettors in complicity as found here, or have individually been proven guilty beyond a reasonable doubt by the State of Ohio of the charges before this Court, that is, aggravated murder, aggravated robbery, and kidnapping.

On the other hand, if the State failed to prove any one of the essential elements of those three crimes, statutory crimes, these defendants should be found not guilty.

Now, ladies and gentlemen, once again I will repeat in this particular case we have multiple counts and multiple persons being charged. If you find that the State has proven beyond a reasonable doubt all of the essential elements of any one or more of the crimes charged in the various counts of the indictment, then your verdict must be guilty as to such crime or crimes according to your finding. If you find, on the other hand, that the State has failed to prove beyond a reasonable doubt any one of the essential elements, or any one or more of the crimes charged in the separate count of the indictment, then your verdict must

be not guilty.

Once again, the charges as set forth in each count and the charges constitute separate and distinct matter, you must consider each count and the evidence applicable to each count separately and you must consider and separate your finding to each count uninfluenced by your verdict as to the other counts and other defendants. Each defendant may be guilty or not guilty, not guilty or guilty, of any one or all of the crimes charged.

As to the counts, you have multiple counts and you must decide as to the guilt and innocence of each one of these three defendants here as if they were tried separately and if you cannot agree on a verdict as to each -- all of the defendants, or you agree as to one or more, you must render your verdict as to that one or more whose guilt you agree on, or innocence you agree on. And you must separately consider the evidence applicable to each of the defendants as though there were three separate trials and consider your finding as to each defendant uninfluenced by your verdict as to the other defendant.

(Tr. 6177-95).

-END-

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44551

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STATE OF OHIO,

PLAINTIFF-APPELLEE,

- VS -

ROBERT O'NEAL,

DEFENDANT-APPELLANT.

JOURNAL ENTRY
and
OPINION

FEE

JUL 25 1985

DATE OF ANNOUNCEMENT OF DECISION:

CHARACTER OF PROCEEDING: Criminal Appeal from the Common Pleas Court, Case No. CR-76350

JUDGMENT: Judgment affirmed.

DATE OF JOURNALIZATION: SEP 4 1985

APPEARANCES:

For Plaintiff-Appellee: John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Ohio;
Carmen M. Marino,
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The Justice Center, 1200 Ontario
Cleveland, Ohio 44113

For Defendant-Appellant: Marillyn Fagan Damelio
The Marion Building, Room 307
1276 West Third Street
Cleveland, Ohio 44113

EXHIBIT C

O'NEILL, P.J.

The appellant, Robert O'Neal, was indicted for aggravated murder, aggravated robbery and kidnapping. He came on for trial with co-defendants, Lloyd Allen and Dimple Podborny. At the conclusion of the trial, the jury returned guilty verdicts on all charges, not only for this appellant but for his two co-defendants. The appellant was sentenced to life and two 7-25 years sentences. A timely notice of appeal was filed with this court.

The first assignment of error complains that the appellant was denied a fair trial and his right to trial by a jury drawn from a representative cross-section of the community. When the State used its peremptory challenges to remove prospective jurors on the sole ground of group racial bias. The appellant brings to our attention the fact that the State, in the exercise of its peremptory challenges, excused seven blacks from the jury.

During the voir dire process, counsel for the appellant joined in a motion for mistrial and called to the court's attention that, out of six peremptories that the State had exercised, four black persons had been excused (Tr. 1237, 1240). After a short informal discussion, the court overruled the motion.

The essential nature of a peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control. Lewis v. U.S., 146 U.S. 370, 378. The peremptory challenge is frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 221. In discussing the purpose and use of the peremptory

challenge, the Swain court, at page 221, wrote "for the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is, in fact, partial, but whether one from a different group is less likely to be. It is well known that these factors are widely employed by both prosecutor and accused. Hence, veniremen are not always judged as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of negroes, in a particular case, is a denial of equal protection of law."

In concluding the discriminatory exclusion argument under peremptory challenges, the Swain court went on to hold "the presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not over-come and the prosecutor therefore subjected to examination by allegations that in the case at hand all negroes were removed from the jury or that they were removed because they were negroes." It is our conclusion that the expressions in the Swain case are totally applicable and dispositive of this assignment of error. The appellant agrees in his brief that the Swain burden has proved insurmountable and that he would not be able to comply with that burden. However, appellant goes on to argue that the method in which the prosecutor exercised his peremptory challenges denied the appellant his state constitutional and sixth amendment right to trial by a jury drawn from a representative cross-section of the community. In furtherance

of this assignment of error, the appellant calls our attention to Article 1, Sec. 5 and Sec. 10 of the Ohio Constitution. Section 5 provides that the right of a trial by jury shall be inviolate and Sec. 10 provides that the defendant was entitled to a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. Apparently, the appellant would have us rule that in any criminal case, in which the defendant is a black person, the only impartial jury before whom he might be tried must be composed of a black majority. We can think of no intelligent reason to make such an assumption. Each of the twelve members of the jury chosen in this case, during the voir dire proceedings and as a part of their oath, promised that they would faithfully and impartially discharge their duties as jurors. This action, on the part of the jurors, raises an inalterable fact rather than a presumption. In the case of Taylor v. Louisiana, 42 L. Ed 2d 690, the United States Supreme Court concluded that a state constitution and statute, which systematically excluded women from jury duty, was unconstitutional and in violation of the Sixth Amendment for the reason that such a jury was not drawn from a fair cross-section of the community. In Taylor, the Supreme Court (p. 703) made a statement rather applicable to the case at hand. "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." No charge is raised in this case that the selection of prospective jurors involved any patent discrimination. This first assignment of error is overruled.

Assignment of error number four is that during the examination of a police officer, the prosecutor asked the court to direct all parties to refrain from asking why appellant's gun had been initially confiscated by the East Cleveland Police Department. The court ordered all parties not to examine witnesses concerning why appellant's gun had been confiscated. The jury was to know only that it was returned to him on January 6, 1981.

Appellant's gun had initially been confiscated because he was involved in a homicide. As a result of that investigation, he was charged with voluntary manslaughter, but the charge was eventually dismissed. During cross-examination of the appellant, in spite of his previous order, the court permitted the prosecutor to extensively cross-examine the appellant about the details surrounding the manslaughter case. The appellant contends that this amounted to a violation of the order in limine and was also erroneously the admission of evidence of other crimes, wrongs or acts.

During direct examination, the appellant raised the issue of the East Cleveland incident. As a part of his testimony, he testified that he had received $6500.00 to buy a liquor license and that that money was eventually used to pay an attorney for a"little problem in East Cleveland with Judge Devinne to get the firearm back. He threw it out of court." He went on to testify that the gun which was returned to him was registered and that it was a crime in East Cleveland to have an unregistered gun. During examination by one of the other defense counsel, appellant stated that the gun had been taken from him on one day and returned the next day. The State argues that it was the appellant who opened the door on the East Cleveland incident and that it was deliberately done to convince the jury that

the appellant had a gun but that the gun was registered and that he would be a fool to kill anybody with a registered gun. The State further points out that when the appellant testified that the gun was returned to him, on the day after which it was seized, he was lying. The State had absolute knowledge that the gun was seized on June 5, 1980 and returned to the appellant on January 6, 1981. When one considers the record, it is obvious that the State, in their active cross-examination as to the East Cleveland incident, was primarily attempting to attack the credibility of the defendant-appellant, rather than attempting to bring to the jury's attention other acts of the defendant. In their introduction of testimony, it was necessary that the State bring to the attention of the jury that the appellant, as to the East Cleveland incident, was released from any charges brought therein. Reason would say that such evidence would do nothing to prove the character of the appellant in order to show that he acted in conformity therewith. It is more plausible to assume that the prosecution was conducting a cross-examination on a relevant matter affecting credibility, the door to which had been actively opened and pursued by the appellant himself. Accordingly, we find this assignment of error to be without merit.

The second assignment of error complains that the appellant was denied his constitutional right to a fair trial by the admission of gruesome, inflamatory photographs.

Initially, the appellant complains that the court erred in admitting, over objection, eighteen (18) photographs of the remains of the decedent taken by the coroner, and two (2) photographs depicting the decedent's remains located in a field. The court also, over

objection, permitted the introduction as exhibits of the actual clothes and various coverings which were found on the body. The court also allowed, over objection, the admission of a portion of skin removed from the appellant's finger and produced at trial in a liquid in a brown bottle. There is no argument as to the relevancy of these exhibits, but rather an argument that the court should have excluded some of them because their probative value outweighed the danger of prejudice.

The mere fact that a photograph is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. Evidence had been presented that,when the decedent's body was found, he had been dead for some weeks. State's exhibits 1(A) through 1(Q),being photographs of the decomposed remains of the decedent, are relevant and contribute to proof that the decedent had been dead for a prolonged period of time before his body was found. The piece of finger skin,removed from the decomposed remains, was used to establish the identification of the decedent. In the chain of evidence, the identifying finger skin was relevant to the decomposed remains. The decomposed remains were relevant to proof that the body had lain for a long time in a secret place. Perhaps the number of photographs (18 of the decomposed remains) was somewhat excessive, but we consider the importance of its relevancy to far-out way the danger of unfair prejudice or confusion. We reach the same conclusion as to the introduction of the decedent's clothing. As an additional point, we find that amongst this clothing there was also introduced some other articles which were strongly relevant and indicative of an attempt to hide the body and we find that this is

relevant to the case and not abusive. Over objection, the State also introduced a crow bar which was found in a bar owned and operated by the appellant, O'Neal. We can find no relevancy amongst the evidence which would connect this crow bar with the case. The prosecution argues that there was testimony that the decedent had been bludgeoned and shot and that perhaps this crow bar was used in that attack. We find this argument to be weak and conclude that the admission of this crow bar was erroneous. However, we do not conclude that, in view of all of the other evidence in the trial, that the admission of this exhibit was so prejudicial as to justify a reversal.

The third assignment of error complains that appellant was denied his right to a fair trial and his right to confront and cross-examine an adverse witness when the trial judge permitted an FBI agent to refuse to answer questions directed at him under cross-examination. Co-defendant, Dimple Podborney, subpoened and examined an FBI Agent, Graessle. The appellant attempted cross-examination of this witness, however, the witness refused to answer any questions and a United States Attorney explained to the court that the agent was not authorized to answer any questions posed by the appellant. In Volume 28 of the Code of Federal Regulations and especially at Sections 1621 et seq., a party desiring to secure information from an agent of the justice department may make application with the Attorney General of the United States, setting forth in said application the information which the party desires to elicit. It is then up to the justice department to decide whether such agent will be permitted to disclose the desired information. Further on under this chapter of the Federal Regulations, a procedure is set forth whereby a denial of such information may be administratively appealed.

This appellant had made no such application to the [redacted] Department. The United States Supreme Court has considered this regulation in the case of the United States of America ex rel Rodger Touhy v. Ragen, 340 U.S. 462, and concluded that such regulation is valid. The regulation does not prohibit nor preclude the disclosure of information by a government agent but rather regulates it and with good reason.

> "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness indeed the necessity of centralizing determination * * * is obvious." United States of America ex rel Rodger Touhy v. Ragan, 340 U.S. 462, 467.

In the case at hand, the appellant could have but did not subpoena the FBI Agent. The appellant could have but did not submit the required application to the Justice Department. The appellant could have but did not request a continuance of the trial so that he could pursue the application requirement. In the case of United States v. Marino (C.A.6, 1981), 658 F. 2d 1120, the court concluded that the question of whether the procedure set forth in the Code of Federal Regulations denies a defendant a Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied (p. 1125). Accordingly, we conclude that this assignment of error is without merit.

The fifth and sixth assignments of error complain that the appellant was denied a fair trial by the court's instructions on complicity and instructions on conspiracy when, in fact, the appellant was never charged with conspiracy.

During the conduct of the trial and especially during in-

structions, there were repeated references to and definitions [redacted] thereof in spite of the fact that the appellant was not charged with the statutory crimes of conspiracy and complicity. We have previously faced this same issue in the case of State of Ohio v. Dimple Podborny, (Cuyahoga County C.A. Case No. 44574) and State of Ohio v. Lola Gail Toney, (Cuyahoga County C.A. Case No. 44220). Our consensus in those two cases was that the State is not obliged to charge a defendant under R.C. 2923.01, where the substantive crime charged was committed as the result of a conspiracy. The conspiratorial conduct becomes the vehicle by which the crime is executed thereby making all the co-conspirators liable for the substantive crime. In further support of our conclusion, we draw attention to the case of the United States v. Hoffa (C.A. 6), 349 F. 2d 20. In Headnote 30 of that case, the Court of Appeals noted that "conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime."

Accordingly, we find that assignments of error number five and six are without merit and the judgment of the trial court is affirmed.

Judgment affirmed.

JOURNALIZED SEP 4 1985

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COSTS TAXED.

ALL PARTIES.

It is ordered that appellee(s) recover of appellant(s) ..... its ..... costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

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*/ STILLMAN, J., dissents. See Dissenting Opinion.

*/ DONOFRIO, J., concurs.

PRESIDING JUDGE
*/ JOSEPH E. O'NEILL

*/ SITTING BY ASSIGNMENT:
SAUL G. STILLMAN, Ret'd. J. of the Eight Appellate District.
JOSEPH DONOFRIO, J. of the Seventh Appellate District.
JOSEPH E. O'NEILL, J. of the Seventh Appellate District.

BOOK 192 PAGE 65

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and the period for review will begin to run.

A-110

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 44551

STATE OF OHIO Plaintiff-Appellee -vs- ROBERT O'NEAL Defendant-Appellant	DISSENTING OPINION

DATE: JUL 25 1985
STILLMAN, J., DISSENTING:

For the reasons which I have indicated in my dissenting opinion in State of Ohio vs. Dimple Podborny, Court of Appeals Case No. 44574, I respectfully dissent in this case as well.

BOOK 192 PAGE 66

A-111

COUF OF APPEALS OF OHIO, EIGI DISTRICT
COUNTY OF CUYAHOGA

No. 44574

State of Ohio,
Plaintiff-Appellee

Vs.

Dimple Podborny,
Defendant-Appellant

DISSENTING
OPINION

JUL 30 1985
DATE

STILLMAN, J. DISSENTING:

I find it necessary, respectfully, to dissent from the majority in the light of State v. Henry, 4 O. St. 3d, 44 (1983) and the strict mandatory requirements of Criminal Rule 14 and R.C. 2945.20.

In Henry , the Supreme Court of Ohio declared that "where two or more persons are jointly indicted for aggravated murder, each of such persons shall be tried separately, unless the trial court orders a joint trial pursuant to the strict mandates set forth in Criminal Rule 14 and R.C. 2945.20."

Criminal Rule 14 recites in pertinent part:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown."

R. C. 2945.20 provides:

> "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately. The court, for good cause shown on application therefore by the prosecuting attorney or one or more of the defendants, may order said defendants to be tried jointly."

The record does not indicate any compliance with the requirements of Criminal Rule 14 and R. C. 2945.20.

The defendants, Robert O'Neal and four others, Gary Gabbard, Lola Toney, Dimple Podborny and Lloyd Allen were tried for aggravated murder and other offenses arising from the death of Henry Podborny. O'Neal was tried jointly with Dimple Podborny and Lloyd Allen. The remaining defendants were tried together in a separate trial. Counsel for O'Neal moved for a separate trial on two occasions prior to trial. The motions were overruled. The Prosecuting Attorney filed no motion for a joint trial.

Much as I deplo e the necessity for retrials, I am persuaded by the language of the Henry case that separate trials of the indicted individuals in the Podborny cases are mandated.

The entry filed in State v. O'Neal on September 23, 1981 recites, "Hearing had on Motion for Separate Trials; Evidence taken; Motion Denied . . ."

Footnote 4 of the Henry opinion at page 46 declares that the defendants "did not bear the burden of requesting separate trials" and the court reached the conclusion that ". . . because neither the state nor appellee Henry applied and sought affirmative approval for a joint trial for good cause shown pursuant to Crim. R. 14 and R.C. 2945.20, we . . . remand the cause for a new trial wherein Long will be tried separately." Any effort to validate the joint trials held here would require a gross distortion of the language in State v. Henry.

Moreover, the guilt by association inferences which are implicit in the Criminal Rule and Revised Code is reinforced dramatically by the manner in which this case was tried. The reference by the majority opinion to the character of two of the co-defendants as unworthy of trust underscores this consideration.

I also find merit in the eighth assignment of error which again demonstrates the validity of separate trial requirements in capital cases. If an individual defendant is to be convicted because of the mental state of co-defendants, the right to a fair trial and due process of law is seriously compromised.

For the reasons stated, I find that I cannot regard the failure of the prosecuting attorney to apply for a joint trial to be merely a procedural error. A capital case should be prosecuted in strict accordance with the applicable rules and the abuses concomitant with a joint trial were clearly evident in the case sub judice.

I, therefore, dissent.

Citation F.3d 820 (Table) FOUND DOCUMENT Database CTA Mode Page
UNPUBLISHED DISPOSITION
(CITE AS: 8 F.3D 820, 1993 WL 433317 (4TH CIR.(MD.)))

NOTICE: Fourth Circuit I.O.P. 36.6 states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Timothy Scott SHERMAN, Petitioner-Appellant,
v.
Sewall B. SMITH, Warden, Maryland Penitentiary; J. Joseph Curran, JR., Attorney General for the State of Maryland, Respondents-Appellees.
No. 92-6947.
United States Court of Appeals,
Fourth Circuit.
Argued: May 5, 1993.
Decided: October 27, 1993.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
D.Md.
VACATED AND REMANDED.
Andrew Lewis Frey, Mayer, Brown & Platt, Washington, D.C., for Appellant.
Ann Norman Bosse, Assistant Attorney General, Office of the Attorney General, Baltimore, Maryland, for Appellees.
Roy T. Englert, Jr., James G. Duncan, Mayer, Brown & Platt, Stuart H, Robinson, Bel Air,Maryland, Washington, D.C., for Appellant.
J. Joseph Curran, Jr., Attorney General of Maryland, Office of the Attorney General, Baltimore, Maryland, for Appellees.

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

OPINION

**1 Timothy Sherman was convicted of murdering his parents and currently is incarcerated in the Maryland Penitentiary in Baltimore. On petition for a writ of habeas corpus, he has challenged his conviction on the ground that his constitutional rights were violated by a juror's unauthorized and unsupervised visit during his trial to the crime scene. Upon the district court's denial of a writ, Sherman filed a timely notice of appeal.

At approximately one o'clock in the morning of October 12, 1987, Ann and Stevenson Sherman were murdered in their sleep, each killed by a single shotgun blast. Eighteen-year-old Timothy Sherman, Ann's natural son and Stevenson's adopted son, reported that he had been in bed when he heard a single shotgun blast, his mother's screams, and then another shotgun blast followed by silence. He ran to the nearby house of his maternal grandfather, William Gibson, arriving at approximately 1:30 a.m. Gibson testified that"Timmy" was

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"very much out of breath and upset," that he had been crying, and that it took some time for him to calm down enough to explain what had happened. The two returned to the Shermans' house, where Gibson entered Ann and Stevenson Sherman's bedroom and discovered that they were dead. Gibson told his grandson that his parents were dead, causing him to cry again. The grandfather then called other family members and the police. Almost immediately the house filled with people-paramedics, police, family, and even the press.

In their investigation on the day of the murder, the police made two discoveries which were to be the basis of the State's case charging Timothy Sherman with the murder of his parents. First, two deputies, with the aid of a trained dog, found a Stevens 12-gauge shotgun that belonged to the Shermans tightly lodged in a pine tree near the grandparents' house. An examination of the weapon revealed that it had fired the two shells found in the hallway outside Ann and Stevenson Sherman's bedroom. Additionally, a fingerprint on the weapon matched that of Timothy. At trial, the prosecution theorized that the location of the weapon pointed toward Timothy's guilt as he had once used the tree as a hiding place.

The second piece of evidence introduced by the prosecution against Timothy was a box of Remington 12-gauge shotgun shells which was found under the mattress of Timothy's bed. The box, which was designed to hold five shotgun shells, contained three shells that matched the two expended shells found outside the victims' bedroom.

Those two pieces of evidence represented the case against Timothy. The State did not introduce any evidence of motive. In addition, two tests of Timothy's hands for gunpowder residue-one a highly sophisticated neutron activation test-which were taken only hours after the shooting failed to reveal any evidence to support the State's case. Likewise, his clothes tested negative for gunpowder residue and no blood was found on any of his clothes, on his person, or in his bedroom. The lack of gunpowder residue was especially notable because a heavy accumulation of residue was found in Timothy's parents' bedroom.

**2 Timothy also has noted weaknesses in the two pieces of circumstantial evidence which the prosecution relied upon. The State introduced nothing besides the location of the box of shells to establish that it was Timothy Sherman who placed the box under his bed. The box was discovered after many people had been in the house, and thus it was theoretically possible that someone else placed it under Timothy's mattress. The police had not tested the box for fingerprints, so none were introduced.

The key evidence appeared to be the shotgun and its location. Regarding the presence of his prints on the murder weapon, Timothy previously reported to the investigating officers on the morning of the shooting that he had fired the gun the day before the murder, and an FBI fingerprint expert testified at trial that another person could have used the gun without leaving any prints or removing prints that had been left on the gun within the preceding days.

As to the location of the weapon, trial witnesses testified that the pine tree was a well-known neighborhood hiding place. More important, perhaps, was the testimony of the two police officers who removed the gun from the tree. Corporal Hopkins, a strong six-footer, testified that the shotgun was so forcefully lodged in the tree that he "would have had difficulty putting the gun inside the tree in the condition [he] found it." Hopkins weighed 210 pounds, Timothy Sherman 130. In addition, the investigating officers

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discovered no evidence of pine needles or pine tar on Timothy the day after the murders.

Less than one year after the murder of his parents, Timothy Sherman went on trial before a jury in Harford County, Maryland. In its case-in-chief, the prosecution presented extensive evidence describing and otherwise concerning the pine tree where the murder weapon was found and the surrounding property. The State sought to demonstrate that it was possible for Timothy to commit the murders, remove all traces of gunpowder from himself and his belongings, hide the shotgun in the tree, and run to his grandfather's house.

The State showed the jury a videotape of the outside of the Sherman house and the surrounding property, aerial photographs showing the relative locations of the Gibson house, the Sherman house, and the pine tree, several photographs of the tree, and testimony of both neighbors and police officers regarding the tree and the property. After the State had introduced most of that evidence and after the trial judge denied a motion by Timothy for a jury visit to the site, one member of the jury, unbeknownst to the trial court or the parties, decided to visit the neighborhood and inspect the site.

Juror Blane Miller revealed subsequent to the trial that a few days into the trial, he had driven, accompanied by his wife, "to the Sherman house and then [ ] drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Miller testified at a post-trial hearing that he had never been in that neighborhood before but had determined its location from the evidence presented at trial and that he found the tree but did not leave his car more closely to inspect it. He acknowledged, however, that as a juror he had received the jury handbook which instructed jurors not to speak with others regarding the case or consider evidence other than that presented in the court room. Although the state trial judge would not allow Miller to be questioned regarding either his reasons for visiting the site or the possible influence the site visit had on jury deliberations, Miller did indicate during the hearing that he inspected the scene because he wanted to see "the tree that was so much in question."

**3 At the conclusion of the trial, the jury convicted Timothy Sherman of two counts of first degree murder. Based on Miller's revelation, however, defense counsel made a motion for a new trial. Timothy Sherman argued to the trial court that the site visit by Miller violated his Sixth Amendment rights and justified a new trial. The state trial court when reviewing Sherman's challenge simply relied on its past ruling that a jury site visit was unnecessary and thereby concluded that any such visit was extraneous and irrelevant:

> I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered.

The state trial judge failed to make an independent determination or to require the prosecution to explain why the admittedly constitutional error was harmless. Instead, he simply placed the burden of proof on Sherman and relied on his own previous ruling without investigating whether the error was structural, i.e., one of law, or merely a trial error. See Sullivan v. Louisiana, 113 S.Ct. 2078, 2082-83 (1993). The trial court then sentenced Timothy Sherman to two consecutive terms of life imprisonment.

On its direct review of Sherman's conviction, the Maryland Court of Special

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Appeals deferred to the trial judge's discretion. In addition, that court also assumed the burden of proof was on Sherman: "Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case." The Court of Special Appeals of Maryland upheld the conviction.

Both the Maryland Court of Appeals and the United States Supreme Court denied Timothy Sherman's requests for a writ of certiorari, although Justices White and Marshall would have granted cert. Having exhausted his post-conviction relief in the Maryland courts, Timothy Sherman sought a writ of habeas corpus from the United States District Court for the District of Maryland.

The district court referred the case to a magistrate judge who recommended that the writ not be granted. In his Report and Recommendation, the magistrate judge concluded, as an initial matter, that Sherman bore the burden of proving that the error was not harmless. Next, the magistrate judge, taking the position that Timothy had to meet the clearly erroneous standard, accepted the state court's conclusion that Sherman failed to prove that the juror's site visit was not harmless. The district judge, in a one-page memorandum and order, adopted the magistrate judge's report.

The district court relied also on answers to questions which had not actually been investigated. It, therefore, may have imposed an improper standard of review on Timothy with regard to the state court's determination of harmlessness and may improperly have placed the burden of showing the error was not harmless on the defendant. The Supreme Court has ruled consistently that habeas courts must review the entire record de novo in determining whether a trial error affecting substantial rights influenced jury deliberations and that the burden of showing harmlessness rests with the state. See Kotteakos v. United States, 328 U.S. 750 (1946).

**4 Recently, the Supreme Court employed de novo review in a case in which it concluded that Kotteakos governed federal habeas corpus determinations of whether constitutional error of trial type was harmless. Brecht v. Abrahamson, U.S., 113 S.Ct. 1710 (1993); see also Wright v. West, U.S. # 6D 6D6D6D# ,, 112 S.Ct. 2482, 24922493 (1992) (engaging in de novo review); Chapman v. California, 386 U.S. 18, 24 (1967). Therefore, perhaps, the district court, in reviewing Sherman's constitutional challenge, should have first decided whether the question was one of law, i.e., subject to de novo review. See also United States v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984) (reviewing de novo an alleged violation of right to an impartial jury).

The Supreme Court also held in Kotteakos that burden of proof is on prosecutors to explain why trial errors were harmless. Justice Rutledge, writing for the Court, plainly states that unless an error is merely "technical", the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution. Kotteakos, 328 U.S. at 760-761. Here, there has been no decision as to whether or not the error was merely technical. As Justice Stevens notes in his concurrence in Brecht, "[a] constitutional violation, of course, would never fall in [Rutledge's] 'technical' category." Brecht, U.S. at, 113 S.Ct. at 1723-1724 (Stevens, J. concurring).

Because the district court erred in not reviewing the entire record de novo to answer questions as to the nature of the error-structural or trial-and whether it was technical or not, and, depending on the answers to those queries,

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whether the error influenced the jury's deliberations, with the burden on prosecutors to explain why trial errors were harmless, we vacate the district court's order and remand for further findings in accord with Kotteakos .

VACATED AND REMANDED

PHILLIPS, Circuit Judge, concurring in part and concurring in the judgment:

I agree with the majority that a state court's finding that a federal constitutional error is harmless is not a "finding of fact" entitled to a presumption of correctness on federal habeas review under 28 U.S.C. s 2254(d); that, instead, the issue of harmlessness is a mixed question of law and fact reviewable de novo on federal habeas. See Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1981); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987); Lacy v. Gardino, 791 F.2d 980, 986 (1st Cir.), cert. denied, 479 U.S. 888 (1986); cf. Miller v. Fenton, 474 U.S. 104 (1985) ("voluntariness" of confession is a mixed question of law and fact entitled to de novo review on federal habeas); see also Wright v. West, 112 S.Ct. 2482, 2491-92 (1992) (declining invitation to overrule Miller and applys 2254(d) presumption of correctness to mixed questions of law and fact). I also agree that in denying habeas relief here, the magistrate judge failed to conduct a de novo inquiry into the harmlessness of the found Sixth Amendment error, but instead improperly deferred to the state court's prior determination that the error was harmless. Because I think that error alone merits our vacating and remanding here, I concur in the judgment.

**5 I write separately, however, because of doubt about the soundness of the majority's alternative holding that the State bears the burden of proving constitutional error harmless on federal habeas review. That surely has been the rule until recently, and it may still be. But the Supreme Court's recent decision in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), casts enough doubt on its continued validity that I think we should simply stay away from it as an alternative ground of decision.

The principal issue in Brecht was what standard should be used to decide whether constitutional error may be disregarded as harmless on federal habeas: the stringent standard of Chapman v. California, 386 U.S. 18, 24 (1967) (error is harmless only if reviewing court can say, "beyond a reasonable doubt," that the error "did not contribute to the verdict obtained"), or the relatively more forgiving standard of Kotteakos v. United States, 328 U.S. 750, 776 (1946) (error is harmless unless reviewing court can say that it "had a substantial and injurious effect or influence in determining the jury's verdict"). The Court held that while the Chapman standard applies to most constitutional errors on direct review, the more lenient Kotteakos standard should apply to those same errors on federal habeas review, because it is "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying this Court's recent habeas jurisprudence." Id. at 1722.

The majority here assumes that in adopting Kotteakos 's harmlessness standard for use in federal collateral review, the Brecht Court also intended to adopt Kotteakos 's separate holding that the burden of proving a particular error harmless under that standard rests with the State. Slip op. at 6. With all respect, I am not so sure that Brecht can be read to do this. It is true that the Brecht majority did not specifically consider the question of who bore the burden of proof with respect to harmlessness on

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federal habeas. But Chief Justice Rehnquist, writing for a majority of five, used language that strongly suggested the Court intended to place that burden on the habeas petitioner, rather than the State. See 113 S.Ct. at 1722 (under the newly-adopted Kotteakos standard, "habeas petitioners ... are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' ") (emphasis added). Three of the four dissenters specifically read that language as a deliberate re-casting of the burden of proof with respect to harmlessness from the State to the habeas petitioner. See 113 S.Ct. at 1735, 1727 (White, J., joined by Justice Blackmun and by Justice Souter, in relevant part, dissenting) ("the Court now invokes Kotteakos ... to impose on the defendant the burden of establishing that the error 'resulted in actual prejudice ' ") (emphasis added). Only Justice Stevens, who joined the Chief Justice's opinion for the Court but also wrote a separate concurring opinion, indicated that he understood the Court's adoption of the Kotteakos standard to leave the burden of showing harmlessness "on prosecutors." 113 S.Ct. at 1723 (Stevens, J., concurring).

**6 Because Justice Stevens provided the critical fifth vote to affirm the judgment below, I suppose we might read his concurrence as controlling on the burden-of-proof question. But I think this runs an unnecessary risk here, for several reasons. First, Justice Stevens also joined the majority opinion, with its contrary suggestions about the location of the burden of proof. Second, Justice Stevens' remark that the burden of proof would remain on prosecutors seems more one made in passing than an explicit expression of disagreement with the contrary intimations in the majority opinion. Finally, Justice White's reading, in dissent, of the majority opinion-as adopting a different rule on the cast of the burden of proof on harmlessness for federal habeas review than applies on direct review-is more consistent with the obvious design of recent decisions of the Court confining the scope of federal collateral relief and emphasizing that it is not automatically available simply because a petitioner has proved an error that might merit reversal on direct appeal. [FN1] For these reasons, I think that in prudence, whatever we may think of the rule, we should assume that the Brecht Court meant exactly what its majority opinionsaid: that the habeas petitioner has the burden of proving a constitutional error prejudicial-i.e., not harmless-under the Kotteakosstandard. [FN2]

Because I think it unwise and unnecessary to rest decision on the burden of proof point, the improper deference basis being sufficient,

I do not join those portions of the majority opinion discussing allocation of the burden of proof.

FN1. See, e.g., Teague v. Lane, 489 U.S. 288 (1989) (although new rules of law have retroactive application in criminal cases on direct review, they seldom do on federal habeas); Pennsylvania v. Finley, 481 U.S. 551 (1987) (although a criminal defendant has a constitutional right to counsel on direct appeal, he has no such right on federal habeas); United States v. Frady, 456 U.S. 152 (1982) (while the federal "plain error" rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the stricter "cause and prejudice" standard applies in determining whether that same claim may be raised on federal habeas); Stone v. Powell, 428 U.S. 465 (1976) (Mapp claims are not cognizable on

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federal habeas, even when they might merit reversal on direct review).

FN2. In this connection, it may be appropriate to note that under legislation currently pending in Congress, 28 U.S.C. s 2254(d) would be amended to make clear that the State bears the burden of persuading the court that constitutional error was harmless on federal collateral review. H.R. 3131, 103rd Cong., 1st Sess. s 303 (1993) (amending 28 U.S.C. s 2254(d) to add that on federal habeas, "[i]n the case of a violation that can be harmless, the State shall bear the burden of proving harmlessness").

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